

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(1) DEFINITIONS/1. Meaning of 'easement'.

EASEMENTS AND PROFITS A PRENDRE (

1. NATURE AND CHARACTERISTICS OF EASEMENTS

(1) DEFINITIONS

1. Meaning of 'easement'.

An easement¹ is a right annexed² to land to utilise other land of different ownership³ in a particular manner⁴ (not involving the taking of any part of the natural produce of that land or of any part of its soil⁵) or to prevent the owner of the other land from utilising his land in a particular manner⁶.

Though an easement cannot exist in gross but must always be appurtenant to a dominant tenement which it accommodates, it is nevertheless 'land' for the purposes of the 1925 property legislation⁷. However, an incorporeal right such as a right of way is not capable of being 'occupied' so as to come within the meaning of that term in the context of premises occupied by a tenant under a business tenancy⁸; not does it fall within the definition of 'land' for the purposes of the provision⁹ of the Law of Property Act 1925 dealing with statutory commencements of title¹⁰ or the definition of 'land' for the purposes of the Limitation Act 1980¹¹.

1 For the essential characteristics of an easement see PARA 8 post. For comparisons of easements with other rights see PARA 35 et seq post.

2 See PARA 9 et seq post.

3 See PARA 17 post.

4 For examples of easements see PARA 31 et seq post.

5 See PARA 44 post.

6 See *Termes de la Ley*, Easement; *Robins v Barnes* (1615) Hob 131; *Metropolitan Rly Co v Fowler* [1892] 1 QB 165 at 171, CA, per Lord Esher MR; affd [1893] AC 416, HL; *Hewlins v Shippam* (1826) 5 B & C 221 at 229-230 per Bayley J; *Mounsey v Ismay* (1865) 3 H & C 486 at 497 per Martin B; *Reilly v Booth* (1890) 44 ChD 12 at 26, CA; *Peers v Lucy* (1694) 4 Mod Rep 362; and see generally *Baker v Brereman* (1635) Cro Car 418. See also *Taff Vale Rly Co v Cardiff Rly Co* [1917] 1 Ch 299 at 317, CA, per Scrutton LJ (use of word in Acts of Parliament).

7 See the Settled Land Act 1925 s 117(ix) (as amended); the Trustee Act 1925 s 68(6) (as amended); the Law of Property Act 1925 s 205(1)(ix) (as amended) (incorporated in the Trusts of Land and Appointment of Trustees Act 1996 by s 23(2)); and REAL PROPERTY; and cf the Land Registration Act 1925 s 3(viii) (repealed). In relation to land charges see the Land Charges Act 1972 s 17(1); and *Allen v Greenhi Builders Ltd* [1978] 3 All ER 1163, sub nom *Greenhi Builders Ltd v Allen* [1979] 1 WLR 156. See also *Willies-Williams v National Trust for Places of Historic Interest or Natural Beauty* (1993) 65 P & CR 359, CA.

8 Ie so as to come within the Landlord and Tenant Act 1954 s 23(1) (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 706): *Land Reclamation Co Ltd v Basildon District Council* [1979] 2 All ER 993, [1979] 1 WLR 767, CA.

9 Ie the Law of Property Act 1925 s 44(1) (as amended): see SALE OF LAND vol 42 (Reissue) PARA 139.

- 10 *Barclays Bank plc v Lougher* (1996) 51 ConLR 75.
- 11 See the Limitation Act 1980 s 38(1) (as amended); and LIMITATION PERIODS.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(1) DEFINITIONS/2. Meaning of 'dominant tenement' and 'servient tenement'.

2. Meaning of 'dominant tenement' and 'servient tenement'.

The piece of land in respect of which an easement is enjoyed is called 'the dominant tenement', and that over which the right is exercised is called 'the servient tenement'¹; and the expressions 'dominant owner' and 'servient owner' bear corresponding meanings².

1 *Hawkins v Rutter* [1892] 1 QB 668, DC.

2 See PARA 8 et seq post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(1) DEFINITIONS/3. Meaning of 'servitude'.

3. Meaning of 'servitude'.

An easement is a servitude, but 'servitude' is a wider term and includes both easements and profits à prendre¹.

¹ *Dalton v Angus* (1881) 6 App Cas 740 at 796, HL, per Lord Selborne LC. As to profits à prendre see PARA 254 et seq post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(1) DEFINITIONS/4. Incorporeal rights.

4. Incorporeal rights.

An easement has been said not to be in strictness an incorporeal hereditament as an easement does not descend apart from the ownership of the land constituting the dominant tenement to which it is annexed¹. It has, however, long been ordinarily described as an incorporeal right² and is now always treated as an incorporeal hereditament³.

1 Challis on Real Property (3rd Edn, 1911) pp 46, 55, 56, where this view, which is based on Co Litt 121b, 237b, 332a, is questioned and the contention is supported by formidable authority to the effect that an easement is an incorporeal hereditament and is inveterately so described since 1828 for most purposes.

2 *Hewlins v Shippam* (1826) 5 B & C 221 at 229 per Bayley J.

3 See *Bryan v Whistler* (1828) 8 B & C 288 at 293; *Liggins v Inge* (1831) 7 Bing 682; *Wood v Leadbitter* (1845) 13 M & W 838; *Hill v Midland Rly Co* (1882) 21 ChD 143; *Great Western Rly Co v Swindon and Cheltenham Extension Rly Co* (1882) 22 ChD 677, CA; affd (1884) 9 App Cas 787, HL; *Jones v Watts* (1890) 43 ChD 574 at 583, 585, CA; *McManus v Cooke* (1887) 35 ChD 681; *Lord Hastings v North Eastern Rly Co* [1898] 2 Ch 674; affd [1899] 1 Ch 656, CA; sub nom *North Eastern Rly Co v Lord Hastings* [1900] AC 260, HL; and see *Re Brotherton* (1907) 77 LJ Ch 58; on appeal (1908) 77 LJ Ch 373, CA (question whether an easement was an incorporeal hereditament to which the powers of a tenant for life applied under the Settled Land Acts 1882 to 1890 (repealed: see now the Settled Land Act 1925; and SETTLEMENTS)). In rating and taxing statutes 'hereditaments' may not include an easement (*Chelsea Waterworks Co v Bowley* (1851) 17 QB 358; *Southport Corp v Ormskirk Union Assessment Committee* [1894] 1 QB 196, CA), although it will include a railway tunnel (*Metropolitan Rly Co v Fowler* [1893] AC 416, HL), or other tunnel (*Holywell Union and Halkyn Parish v Halkyn Drainage Co* [1895] AC 117, HL); see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 27.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(1) DEFINITIONS/5. Meaning of 'legal easement'.

5. Meaning of 'legal easement'.

Since 1926 the only easements capable of subsisting at law are easements for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute¹. A legal easement is an easement capable of subsisting at law which has been validly created at law², namely by statute, deed or prescription³. An easement which does not take effect as a legal easement takes effect as an equitable interest and is called an equitable easement⁴.

1 Law of Property Act 1925 s 1(2)(a).

2 Ibid ss 1(4), 205(1)(x) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

3 See PARA 46 et seq post.

4 See PARA 6 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(1) DEFINITIONS/6. Meaning of 'equitable easement'.

6. Meaning of 'equitable easement'.

In the strict statutory meaning¹ of the term an equitable easement is a proprietary interest in land such as would before 1926 have been recognised as capable of being conveyed or created at law, but which now takes effect only as an equitable interest². The class of equitable easements certainly includes those easements which, if created in the same manner before 1926, would have taken effect as legal easements, but which by virtue of the Law of Property Act 1925³ are no longer capable of subsisting at law and thus take effect⁴, if at all, as equitable interests⁵. It is far from certain whether the class of equitable easements extends beyond this limited category⁶. The term 'equitable easement' is also loosely but incorrectly applied to various other equitable rights over land which are not easements within the strict statutory meaning of the term⁷.

1 See the Law of Property Act 1925 ss 1(3), (8), 2(3)(iii), 4(1), 205(1)(x) (as amended); the Land Charges Act 1972 ss 2(1), (5)(iii) (Class D (iii)), 17(1); the Land Registration Act 2002 s 132(1).

2 *ER Ives Investment Ltd v High* [1967] 2 QB 379 at 395, [1967] 1 All ER 504 at 508, CA, per Lord Denning MR; *Poster v Slough Estates Ltd* [1969] 1 Ch 495 at 507, [1968] 3 All ER 257 at 262.

3 Law of Property Act 1925 s 1(2)(a).

4 As to the devolution and enforcement of equitable easements see PARAS 11, 61-62 post.

5 Law of Property Act 1925 ss 1(3), 2(3)(iii), 4(1).

6 See *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA; *Poster v Slough Estates Ltd* [1969] 1 Ch 495, [1968] 3 All ER 257; *Shiloh Spinners Ltd v Harding* [1972] Ch 326, [1971] 2 All ER 307, CA; *revsd* [1973] AC 691, [1973] 1 All ER 90, HL.

7 See PARA 39 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(1) DEFINITIONS/7. Meaning of 'quasi-easement'.

7. Meaning of 'quasi-easement'.

Since it is an essential characteristic of an easement that the dominant and servient owners are different persons¹, if the owner and occupier of two tenements, Blackacre and Whiteacre, exercises some right over one tenement which would constitute an easement if the two tenements were in different ownership, as, for instance, if he goes over a path across Whiteacre to get to Blackacre, there is no easement, for he is simply exercising his rights as owner of Whiteacre². However, in such a case there is commonly said to be a quasi-easement which in some circumstances can ripen into a true easement³.

1 See PARAS 9, 17 post.

2 See *Roe v Siddons* (1888) 22 QBD 224 at 236, CA, per Fry LJ.

3 See PARAS 57, 63 et seq post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/8. Essential characteristics of an easement.

(2) CHARACTERISTICS OF EASEMENTS

8. Essential characteristics of an easement.

The essential characteristics of an easement are¹ (1) there must be a dominant and a servient tenement²; (2) the easement must accommodate the dominant tenement³; (3) the dominant and servient owners must be different persons⁴; and (4) the easement must be capable of forming the subject matter of a grant⁵.

1 See *Re Ellenborough Park, Re Davies, Powell v Maddison*[1956] Ch 131 at 163, [1955] 3 All ER 667 at 673, CA, per Evershed MR.

2 See PARA 9 post.

3 See PARA 14 post.

4 See PARA 17 post.

5 See PARA 18 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/9. Dominant and servient tenements.

9. Dominant and servient tenements.

It is an essential characteristic of every easement that there is both a servient and a dominant tenement¹. The easement must be appurtenant to the dominant tenement².

¹ *Re Ellenborough Park*, *Re Davies*, *Powell v Maddison* [1956] Ch 131 at 163, [1955] 3 All ER 667 at 673, CA; see also *Rangeley v Midland Rly Co* (1868) 3 Ch App 306 at 310; *Hawkins v Rutter* [1892] 1 QB 668 at 671, DC. For the meaning of 'dominant tenement' and 'servient tenement' see PARA 2 ante.

² See PARA 10 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/10. Easement must be appurtenant.

10. Easement must be appurtenant.

A person possesses an easement in respect of his enjoyment of some estate or interest in a particular piece of land, and the easement is said to be appurtenant to that land¹. No one can possess an easement irrespective of his enjoyment of some estate or interest in a particular piece of land, for there is no such thing as an easement in gross². When validly annexed to the land constituting the dominant tenement an easement remains inseparably attached to that tenement so long as the easement continues to exist; the easement cannot be severed from the dominant tenement, nor can estates be created in it apart from the dominant tenement³, nor can it be made a right in gross⁴.

An easement which is created for a legal estate is to enure for the benefit of the land to which it is intended to be annexed⁵, and nothing in the Law of Property Act 1925 affects the right of a person to acquire, hold or exercise an easement over or in relation to land for a legal estate in common with any other person or the power of creating or conveying that easement⁶.

1 See *Hansford v Jago* [1921] 1 Ch 322. An easement is never 'appendant' to land. As to the distinction between 'appendant' and 'appurtenant' see PARA 260 post. Easements are, however, sometimes spoken of as being 'appendant' in some of the older reports; this inaccuracy is due to the ambiguous translation of the word 'pertinens' in old Latin pleadings: see eg *Nicholas v Chamberlain* (1606) Cro Jac 121. See also *Tyrringham's Case* (1584) 4 Co Rep 36b; and COMMONS vol 13 (2009) PARA 401 et seq.

2 *Rangeley v Midland Rly Co* (1868) 3 Ch App 306 at 311 per Lord Cairns LJ; *Hawkins v Rutter* [1892] 1 QB 668 at 671, DC, per Lord Coleridge CJ; *Ackroyd v Smith* (1850) 10 CB 164 at 188 per Cresswell J; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 483, [1967] 1 All ER 833 at 852, CA, per Winn LJ; *London and Blenheim Estates Ltd v Ladbroke Retail Parks* [1993] 4 All ER 157 at 162, [1994] 1 WLR 31 at 36, CA, per Peter Gibson LJ. As to the necessity for the grantee to have an interest in the dominant tenement at the time of the grant of the easement see PARA 55 post.

3 *Clifford v Hoare* (1874) LR 9 CP 362 at 371.

4 *Ackroyd v Smith* (1850) 10 CB 164 at 187-188 per Cresswell J; and see also at 188 note (a); *Bailey v Stephens* (1862) 12 CBNS 91 at 114-115 per Byles J; *Keppell v Bailey* (1834) 2 My & K 517 at 535-536; *Rangeley v Midland Rly Co* (1868) 3 Ch App 306; *Hill v Tupper* (1863) 2 H & C 121 at 127-128; *Thorpe v Brumfitt* (1873) 8 Ch App 650.

5 Law of Property Act 1925 s 187(1). It seems therefore that it is to enure for the benefit of the several tenements of all owners in common of the easement.

6 *Ibid* s 187(2). It seems therefore that each common owner may release his easement without affecting the easement or easements of others.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/11. Devolution of easements.

11. Devolution of easements.

In relation to unregistered land (1) a legal easement, being necessarily appurtenant to the dominant tenement, passes with it and the burden of the easement binds the servient tenement notwithstanding any disposition of the servient tenement by the servient owner¹; (2) an equitable easement created before 1926 binds a purchaser of the servient tenement after 1925 if he had notice of the easement², but an equitable easement created after 1925 only binds a purchaser of a legal estate in the servient tenement for money or money's worth if the easement is registered as a land charge³.

The position in relation to registered land is considered later⁴.

1 le by virtue of the Law of Property Act 1925 s 187(1): see PARA 10 ante. See *Leech v Schweder* (1874) 9 Ch App 463 at 474-475.

2 Law of Property Act 1925 s 2(5)(b).

3 Land Charges Act 1972 ss 2(1), (5)(iii), 4(6) (amended by the Finance Act 1975 s 52, Sch 12 paras 2, 18(1), (5); the Inheritance Tax Act 1984 s 276, Sch 8 para 13); Law of Property Act 1925 s 199(1)(i). An equitable easement, void by reason of non-registration, may in certain circumstances take effect in equity: see PARA 39 post.

4 See PARAS 61-62 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/12. Dominant tenement.

12. Dominant tenement.

The dominant tenement¹ to which an easement is appurtenant generally consists of corporeal real property, namely land and buildings upon the land. An easement may, however, be appurtenant to a wholly incorporeal hereditament² or to a hereditament partly corporeal and partly incorporeal³. The true test of appurtenancy is the propriety of relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without any incongruity⁴.

On the one hand an easement may, where the dominant tenement is not specified in the grant, on the evidence of the surrounding circumstances be held to be appurtenant to other land besides that which is conveyed by the deed⁵, and on the other hand may be limited to a part only of the dominant land where this is the proper construction of the description of the right contained in the grant⁶.

1 As to identification of the dominant tenement and the admissibility of extrinsic evidence where the dominant tenement is not specified clearly see *The Shannon Ltd v Venner Ltd* [1965] Ch 682, [1965] 1 All ER 590, CA. See also *Thorpe v Brumfitt* (1873) 8 Ch App 650; *Callard v Beeney* [1930] 1 KB 353; *Johnstone v Holdway* [1963] 1 QB 601, [1963] 1 All ER 432, CA; *British Railways Board v Glass* [1965] Ch 538, [1964] 1 All ER 418, CA; *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015; *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993.

2 See *Hanbury v Jenkins* [1901] 2 Ch 401 at 422 per Buckley J (incorporeal right of way appurtenant to incorporeal right of fishing). See also *A-G v Copeland* [1901] 2 KB 101 per Lord Alverstone CJ; the decision in this case was however reversed on appeal at [1902] 1 KB 690, CA; *Sussex Investments Ltd v Jackson* [1993] EGCS 152, (1993) Times, 29 July, CA.

3 *Re Salvin's Indenture, Pitt v Durham County Water Board* [1938] 2 All ER 498.

4 Co Litt 121b, note (7), adopted by Buckley J in *Hanbury v Jenkins* [1901] 2 Ch 401 at 422.

5 *The Shannon Ltd v Venner Ltd* [1965] Ch 682, [1965] 1 All ER 590, CA.

6 *Henning v Burnet* (1852) 8 Exch 187. Contrast *British Railways Board v Glass* [1965] Ch 538, [1964] 1 All ER 418, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/13. Servient tenement.

13. Servient tenement.

The servient tenement must be sufficiently ascertained to enable its area and boundaries to be defined and pointed out¹.

¹ *Woodman v Pwllbach Colliery Co Ltd* (1914) 111 LT 169, CA; affd sub nom *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, HL.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/14. Accommodation of dominant tenement.

14. Accommodation of dominant tenement.

An easement must accommodate and serve the dominant tenement thereby conferring on the dominant tenement a real and practical benefit in fact¹, and must have some necessary connection with the dominant tenement as such².

1 See PARA 15 post.

2 See PARA 16 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/15. Benefit to dominant tenement.

15. Benefit to dominant tenement.

An easement must be such as to confer on the dominant tenement a real and practical benefit¹. The benefit must exist in fact; thus there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland because such a right of way in Kent cannot be any benefit to the owner of the estate in Northumberland as such owner². However, the dominant and the servient tenements need not be physically contiguous, so long as the easement is of benefit to the dominant tenement³.

1 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 153, [1955] 3 All ER 667, CA.

2 *Bailey v Stephens* (1862) 12 CBNS 91 at 115, per Eyles J; *Macepark (Whittlebury) Ltd v Sargeant* [2003] EWHC 427 (Ch), [2003] 1 WLR 2284, [2003] All ER (D) 63 (Mar).

3 *Todrick v Western National Omnibus Co Ltd* [1934] Ch 561, CA; *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA. See also *Hamble Parish Council v Haggard* [1992] 4 All ER 147, [1992] 1 WLR 122.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/16. Connection with dominant tenement as such.

16. Connection with dominant tenement as such.

The right constituting the easement must have some necessary connection with the normal enjoyment of the dominant tenement and be reasonably necessary for its better enjoyment¹. If the right has no necessary connection with the dominant tenement as such it is not an easement, even though it confers an advantage upon the owner and renders his ownership of the land more valuable². Although an easement must be attached or connected to the dominant tenement it is no objection that it exists for the benefit of or is in some manner (directly or indirectly) related or connected with the business carried on from the dominant tenement by the dominant owner, even if the particular easement can only remain useful so long as the dominant tenement is used for a particular purpose³.

1 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 153, [1955] 3 All ER 667, CA; *Chapman v Edwards* [1938] 2 All ER 507. See also *Ackroyd v Smith* (1850) 10 CB 164; *Bailey v Stephens* (1862) 12 CBNS 91 at 115 per Byles J; *Simpson v Godmanchester Corp* [1897] AC 696 at 707, HL, per Lord Davey; *Todrick v Western National Omnibus Co Ltd* [1934] Ch 561, CA. The grant of a right to nominate unspecified land as the dominant tenement of an easement is not in itself sufficient to create an interest in land which binds successors in title to the servient tenement since land cannot be encumbered with burdens of uncertain extent: see *London and Blenheim Estates v Ladbroke Retail Parks* [1993] 4 All ER 157, [1994] 1 WLR 31, CA (where potential servient tenement transferred before dominant tenement acquired, dominant owner not entitled to exercise right to grant of easement against successors in title to servient tenement).

2 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 170, [1955] 3 All ER 667 at 677-678, CA, per Evershed MR; *Hill v Tupper* (1863) 2 H & C 121.

3 *Copeland v Greenhalf* [1952] Ch 488, [1952] 1 All ER 809; *Moody v Steggles* (1879) 12 ChD 261.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/17. Dominant and servient owners must be different.

17. Dominant and servient owners must be different.

It is an essential characteristic of an easement that the owner and occupier of the dominant tenement and the owner and occupier of the servient tenement must be different persons¹. A person cannot have an easement over his own land², because all acts which he does upon his own land are acts done in respect of his rights as the owner of the land³, and the law does not allow the co-existence of an easement over land with the possession of the land itself⁴.

However, an owner of land can grant an easement over his own land if he is not in possession; thus the owner of two parcels of land can grant an easement over one parcel to a tenant of the other parcel. It would seem that the owner of two parcels of land, one of which is held on trust and the other beneficially, can grant an easement over the land held beneficially in favour of the land held on trust notwithstanding that the result is a unity of legal title to the dominant and servient tenements⁵.

1 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 163, [1955] 3 All ER 667 at 673, CA.

2 *Metropolitan Rly Co v Fowler* [1892] 1 QB 165 at 171, CA; affd [1893] AC 416, HL; *Roe v Siddons* (1888) 22 QBD 224 at 236, CA; *Bolton v Bolton* (1879) 11 ChD 968 at 970-971; *Ladyman v Grave* (1871) 6 Ch App 763 at 768; *Bright v Walker* (1834) 1 Cr M & R 211 at 219; *James v Plant* (1836) 4 Ad & El 749 at 761, Ex Ch; *Murgatroyd v Robinson* (1857) 7 E & B 391 at 397; *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 617-618, PC. Cf *Bunting v Hicks* (1894) 70 LT 455, CA. Similarly an easement (except in the case of light) cannot be acquired by prescription by a tenant against his landlord or against another tenant of the same landlord: see PARA 105 post.

3 *Bolton v Bolton* (1879) 11 ChD 968; *Roe v Siddons* (1888) 22 QBD 224, CA.

4 *Ladyman v Grave* (1871) 6 Ch App 763 at 768 per Hatherley LC.

5 See *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/18. Easement must be capable of grant.

18. Easement must be capable of grant.

An easement must be capable of forming the subject matter of a grant¹. It follows that there must be a capable grantor and a capable grantee², and the right granted must be sufficiently definite³. To constitute an easement the right granted must conform to the general nature and characteristics of an easement⁴.

An easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute⁵.

1 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 163-164, [1955] 3 All ER 667 at 673-674, CA. A negative easement can be the subject matter of a grant: see *Rowbotham v Wilson* (1857) 8 E & B 123 at 147 per Bramwell B; *affd* (1860) 8 HL Cas 348; *Leech v Schweder* (1874) 9 Ch App 463 at 474 per Mellish LJ; *Dalton v Angus* (1881) 6 App Cas 740 at 794-795, HL, per Lord Selborne and at 823 per Lord Blackburn; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213 at 221, CA; *Phillips v Low* [1892] 1 Ch 47 at 50.

2 See PARAS 54-55 post.

3 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 175-176, [1955] 3 All ER 667 at 681, CA.

4 See PARA 19 post.

5 See PARA 48 the text and notes 3-5 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(2) CHARACTERISTICS OF EASEMENTS/19. Nature of rights which can be created.

19. Nature of rights which can be created.

The rights which can be created as legal easements are limited in character. An owner of land cannot attach to that land or any part of it legal incidents of a novel kind so as to create a new species of incorporeal right¹. Only kinds of property well known to the law and readily dealt with by its principles can be recognised, for to allow a multiplication of the species of legal rights would render the law uncertain, to the great harm of the public welfare². However, the class of easements is not closed³. An owner of land may create a right having the nature of an easement and it does not matter that the right is an easement of a description never before known, provided that the right conforms to all the requisite and essential characteristics of an easement⁴. In particular, a right which amounts to a right of joint occupation or which substantially deprives the servient owner of proprietorship or possession cannot be an easement⁵, nor can a right possessing no quality of utility or benefit⁶. Furthermore potential negative easements must be looked at with caution, for the law is very chary of creating new negative easements⁷.

1 *Keppell v Bailey* (1834) 2 My & K 517 at 535 per Lord Brougham LC; *Bailey v Stephens* (1862) 12 CBNS 91 at 115; *Hill v Tupper* (1863) 2 H & C 121 at 128; *Ackroyd v Smith* (1850) 10 CB 164; *Nuttall v Bracewell* (1866) LR 2 Exch 1; *Spencer's Case* (1583) 5 Co Rep 16a; *Great Northern Ry Co v IRC* [1901] 1 KB 416 at 428-429, CA.

2 *Keppell v Bailey* (1834) 2 My & K 517 at 535-536, where Lord Brougham LC pointed out the reasons necessitating the rule in the text. See also *Hill v Tupper* (1863) 2 H & C 121 at 128, where Martin B said that to admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates.

3 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 153, [1955] 3 All ER 667, CA; *Ward v Kirkland* [1967] Ch 194 at 222, [1966] 1 All ER 609 at 614.

4 See PARA 8 et seq ante. For examples of easements see PARA 31 et seq post.

5 See PARA 35 post; cf *Jackson v Mulvaney* [2002] EWCA Civ 1078, [2003] 1 WLR 360, sub nom *Mulvaney v Gough* [2003] 4 All ER 83 (easement created by use of land as communal garden only restricted servient owner's use to extent necessary to ensure continued use of land as communal garden).

6 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 177, [1955] 3 All ER 667 at 682, CA, where all the authorities were reviewed.

7 *Phipps v Pears* [1965] 1 QB 76 at 83, [1964] 2 All ER 35 at 37, CA, per Lord Denning MR.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(3) NATURE, INCIDENTS AND ENJOYMENT OF EASEMENTS /20. Nature of easements.

(3) NATURE, INCIDENTS AND ENJOYMENT OF EASEMENTS

20. Nature of easements.

An easement confers a right over and above the ordinary general rights enjoyed by the owner of land which are annexed to the ownership of real corporeal property; an easement is not 'of common right' but is 'against common right'. As regards the owner of the dominant tenement, an easement involves an enhancement of his ordinary rights; as regards the owner of the servient tenement it involves a corresponding diminution in his ordinary rights¹.

1 *Dalton v Angus*(1881) 6 App Cas 740 at 830, HL, per Lord Watson.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(3) NATURE, INCIDENTS AND ENJOYMENT OF EASEMENTS /21. Rights ancillary to easements.

21. Rights ancillary to easements.

The express grant¹ of an easement is also the grant of such ancillary rights as are reasonably necessary for its exercise or enjoyment². The ancillary right thus implied must be necessary for the use and enjoyment, in the way contemplated by the parties, of the right granted; it is not sufficient that such an ancillary right would be convenient, usual, common in the district or reasonable. The most usual example³ of such an ancillary right is the right of the dominant owner to enter the servient tenement and execute such repairs upon the subject matter of the easement as are reasonably necessary for the enjoyment of the easement⁴. The dominant owner is entitled to protect his right to enter and repair by preventing the doing on the servient tenement of anything which would materially interfere with or render more expensive or difficult the exercise of the right, and the court will restrain such an interference by injunction⁵. It is no defence to proceedings by the dominant owner to show that he may still exercise his right if he only expends more money or exercises greater skill⁶.

¹ The rule also applies to statutory easements and rights over land: see *Central Electricity Generating Board v Jennaway* [1959] 3 All ER 409, [1959] 1 WLR 937.

² *Jones v Pritchard* [1908] 1 Ch 630 at 638 per Parker J; *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321, (1871 Edn) 557; *Goodhart v Hyett* (1883) 25 ChD 182 at 186-187; *Clark v Cogge* (1607) Cro Jac 170; *Hoare v Metropolitan Board of Works* (1874) LR 9 QB 296; *Roberts v Fellowes* (1906) 94 LT 279; *White v Grand Hotel, Eastbourne Ltd* [1913] 1 Ch 113, CA (varied sub nom *Grand Hotel, Eastbourne Ltd v White* 84 LJ Ch 938, HL); *Rudd v Rea* [1921] 1 IR 223 (affd [1923] 1 IR 55, CA); *Bulstrode v Lambert* [1953] 2 All ER 728, [1953] 1 WLR 1064; *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA.

³ For other examples see *McIlraith v Grady* [1968] 1 QB 468, [1967] 3 All ER 625, CA (right to stop ancillary to right of way); *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015 (right to water sheep ancillary to profit of grazing). As to the statutory right to enter neighbouring land to effect repairs etc see the Access to Neighbouring Land Act 1992; and PARA 112 et seq post.

⁴ *Jones v Pritchard* [1908] 1 Ch 630. 'The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit in the land of another, to enter into the land to mend it when occasion requires': *Liford's Case* (1614) 11 Co Rep 46b at 52a. As to the right and obligation of repairing ways see PARAS 175-176 post; as to the same with regard to watercourses see PARA 220 post. In the absence of some repairing covenant there are no rights and obligations to repair in the case of the easement of light or other negative easements: see *Macpherson v London Passenger Transport Board* (1946) 175 LT 279 (support from repairing wall). For cases on repair in regard to easements generally see *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321, (1871 Edn) 557; *Gerrard v Cooke* (1806) 2 Bos & PNR 109; *Newcomen v Coulson* (1877) 5 ChD 133, CA (rights of way); *Hodgson v Field* (1806) 7 East 613; *Goodhart v Hyett* (1883) 25 ChD 182 at 189; *Humphries v Cousins* (1877) 2 CPD 239 at 244, DC; and cf *Sandgate Local Board v Leney* (1883) 25 ChD 183n; *Finlinson v Porter* (1875) LR 10 QB 188, DC; *Beeston v Weate* (1856) 5 E & B 986; *Rhodes v Airedale Drainage Comrs* (1876) 1 CPD 380 at 392-393 (revsd on appeal 1 CPD 402, CA); *Brown v Best* (1747) 1 Wils 174.

⁵ *Goodhart v Hyett* (1883) 25 ChD 182 (house built over a line of pipes on the servient tenement in such a way as to prevent repair of the pipes by the owner of an easement of the flow of water through the pipes).

⁶ *Goodhart v Hyett* (1883) 25 ChD 182; *Thurrock Grays and Tilbury Joint Sewerage Board v EJ and W Goldsmith Ltd* (1914) 79 JP 17. Similarly in *Abingdon Corp v James* [1940] Ch 287, [1940] 1 All ER 446, where access to the plaintiff's water main was seriously impeded by the erection of houses over it, it was held that a mandatory injunction was the only relief applicable to the case. It seems, however, that an injunction will not be granted unless the interference complained of is substantial: see *Sandgate Local Board v Leney* (1883) 25 ChD 183n; and see also PARA 154 post; and CIVIL PROCEDURE. The 'plaintiff' in civil proceedings is now known as the 'claimant': see CIVIL PROCEDURE.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(3) NATURE, INCIDENTS AND ENJOYMENT OF EASEMENTS /22. Dominant owner's obligation to repair.

22. Dominant owner's obligation to repair.

The dominant owner is not normally under an obligation to repair the subject matter of the easement¹. If, however, disrepair in the easement would cause actionable damage to the servient tenement the dominant owner may be practically obliged to maintain the easement to avoid causing a nuisance or trespass². If by reason of natural decay or other circumstances beyond the servient owner's control the servient tenement passes into such a condition that the easement becomes impossible to exercise, then a dominant owner who wishes to continue enjoying the easement must do all that is necessary to make the easement available and must bear all the expenses so arising³. The dominant owner may not alter his mode of enjoyment of the easement by substituting a new easement if the existing easement becomes impossible to exercise; his remedy is to repair the existing easement⁴.

1 See PARA 175 post.

2 *Ingram v Morecraft* (1853) 33 Beav 49; *Jones v Pritchard* [1908] 1 Ch 630 at 638 per Parker J; *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA. See also *Gardner v Davis* [1999] EHLR 13, [1998] 29 LS Gaz R 28, CA (dominant owner did not have a defence, by virtue of his easement of drainage, to a nuisance claim by the servient owner concerning raw sewage flooding the servient land where the septic tank was inadequate to cope with the increase in water usage due to modern day use).

3 See PARA 174 post.

4 See PARA 172 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(3) NATURE, INCIDENTS AND ENJOYMENT OF EASEMENTS /23. Easement creates no right in servient tenement.

23. Easement creates no right in servient tenement.

An easement exists solely for the benefit of the dominant tenement¹ and, being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. If the owner of the dominant tenement wishes to abandon his easement the owner of the servient tenement has no right, nor can he acquire any right, to insist upon a continuance of the exercise of the easement and of any incidental advantages accruing to him or his servient tenement².

The exercise of the easement may, however, incidentally benefit the servient tenement, or it may incidentally benefit other tenements belonging to strangers³; for it is no objection to the exercise of a lawful right that it may indirectly benefit other persons or objects which do not enjoy the same right⁴.

1 *Mason v Shrewsbury and Hereford Rly Co* (1871) LR 6 QB 578 per Cockburn CJ; *Simpson v Godmanchester Corpn* [1897] AC 696 at 703, HL, per Lord Watson. See also *Skull v Glenister* (1864) 16 CBNS 81; *Lawton v Ward* (1696) 1 Ld Raym 75; *Howell v King* (1674) 1 Mod Rep 190; *Harris v Flower* (1904) 74 LJ Ch 127, CA; *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362, CA; *Bradburn v Morris* (1876) 3 ChD 812, CA; *Dand v Kingscote* (1840) 6 M & W 174.

2 *Mason v Shrewsbury and Hereford Rly Co* (1871) LR 6 QB 578.

3 *Simpson v Godmanchester Corpn* [1897] AC 696, HL, where the court upheld an easement entitling a corporation to enter another's land to open sluices in times of flood to protect the corporation's land, notwithstanding the fact that the exercise of this right conferred a similar benefit on other land in favour of which the easement did not exist.

4 *Simpson v Godmanchester Corpn* [1897] AC 696 at 703, 708, HL.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(3) NATURE, INCIDENTS AND ENJOYMENT OF EASEMENTS /24. Extent of burden on servient tenement.

24. Extent of burden on servient tenement.

A true easement is either a right to do something or a right to prevent something; a right to have something done is not an easement, nor is it an incident of an easement¹. An easement merely imposes an obligation to submit to the commission of some act upon the servient tenement by the dominant owner², or an obligation upon the servient owner to refrain from the commission of some act upon his own land³. Accordingly an easement does not cast any burden upon the owner of the servient tenement to commit any act upon that or any other tenement⁴. The owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement⁵, but he must not deal with his tenement so as to render the easement over it incapable of being enjoyed or more difficult of enjoyment by the dominant owner⁶.

1 *Jones v Price* [1965] 2 QB 618 at 631, [1965] 2 All ER 625 at 628, CA, per Willmer LJ.

2 Thus the owner of land over which a private right of way exists is under an obligation not to impede the exercise of the right.

3 Thus the easement of light imposes an obligation upon the servient owner not to build upon his own land in such a manner as to interfere with the dominant owner's enjoyment of light.

4 *Taylor v Whitehead* (1781) 2 Doug KB 745 at 749; *Stockport and Hyde Division of the Hundred of Macclesfield Highway Board v Grant* (1882) 51 LJQB 357 at 359 per Lopes J; *Jones v Pritchard* [1908] 1 Ch 630 at 637 per Parker J; see also *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 322a per Twysden J ('where I grant a way over my land, I shall not be bound to repair it'); *Rance v Elvin* (1985) 50 P & CR 9, CA (plaintiff (now known as 'claimant': see CIVIL PROCEDURE) had an easement for the passage of water coming through pipes on defendant's land, but this could not impose an obligation on the defendant to ensure that any water came into the pipes; however the plaintiff was under an implied obligation to reimburse the defendant for its expenditure on water supplied to the plaintiff); applied to a supply of electricity in *Duffy v Lamb (t/a Vic Lamb Developments)* (1997) 75 P & CR 364, [1997] NPC 52, CA. As to rights and duties of repairing ways see PARAS 175-176 post; and as to watercourses see PARA 220 post.

5 *Jones v Pritchard* [1908] 1 Ch 630 at 637 per Parker J; *Southwark London Borough Council v Mills* [2001] 1 AC 1 at 14, [1999] 4 All ER 449 at 458, HL, per Lord Hoffmann; see also the other cases cited in note 4 supra.

6 *Jones v Pritchard* [1908] 1 Ch 630 at 637 per Parker J; and see *Saint v Jenner* [1973] Ch 275, [1973] 1 All ER 127, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(3) NATURE, INCIDENTS AND ENJOYMENT OF EASEMENTS /25. Particular obligations on servient tenement.

25. Particular obligations on servient tenement.

The owner of a servient tenement may be obliged to execute repairs by reason of special local custom or express contract¹. Such a contract will not be implied and does not run with the land¹. It has been asserted that an obligation to repair may arise by prescription² but if this was ever true as a general proposition it would seem that it is now limited to the anomalous quasi-easement of fencing³.

1 *Jones v Pritchard* [1908] 1 Ch 630 at 637 per Parker J; *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA.

2 See *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 322c, note(3) per Serjeant Williams.

3 See PARA 45 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(4) CLASSIFICATION OF EASEMENTS/26. In general.

(4) CLASSIFICATION OF EASEMENTS

26. In general.

Easements may be classified¹ according to their nature into positive (or affirmative) and negative easements²; continuous and non-continuous easements³; apparent and non-apparent easements⁴; and easements of necessity and those which are not of necessity⁵.

1 In this classification each class is described in comparison with another class. The distinction between such two classes is mainly important in connection with cases of implied grants of easements (see PARA 63 et seq post), or cases of prescriptive claims to easements (see PARA 74 et seq post). The distinction between easements of necessity and easements which are not of necessity is of considerable importance: see *Union Lighterage Co v London Graving Dock Co*[1902] 2 Ch 557, CA; *Ray v Hazeldine*[1904] 2 Ch 17; *Wheeldon v Burrows*(1879) 12 ChD 31, CA. As to the origin of these distinctions see *Dalton v Angus*(1881) 6 App Cas 740 at 821, HL, where Lord Blackburn attributes their creation to those who framed the Code Napoleon.

2 *Dalton v Angus*(1881) 6 App Cas 740, HL.

3 *Suffield v Brown* (1864) 4 De GJ & Sm 185; *Worthington v Gimson* (1860) 2 E & E 618; *Pheysey v Vicary* (1847) 16 M & W 484 at 496; *Pyer v Carter* (1857) 1 H & N 916; *Watts v Kelson*(1871) 6 Ch App 166; *Polden v Bastard*(1865) LR 1 QB 156, Ex Ch; *Pearson v Spencer* (1861) 1 B & S 571 at 583; affd (1863) 3 B & S 761, Ex Ch.

4 *Suffield v Brown* (1864) 4 De GJ & Sm 185; *Brown v Alabaster*(1887) 37 ChD 490; *Wheeldon v Burrows*(1879) 12 ChD 31, CA; *Union Lighterage Co v London Graving Dock Co*[1902] 2 Ch 557, CA.

5 *Brown v Alabaster*(1887) 37 ChD 490; *Holmes v Goring* (1824) 2 Bing 76; *Union Lighterage Co v London Graving Dock Co*[1902] 2 Ch 557, CA; *Wheeldon v Burrows*(1879) 12 ChD 31, CA; *Ray v Hazeldine*[1904] 2 Ch 17; *Pearson v Spencer* (1863) 3 B & S 761, Ex Ch.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(4) CLASSIFICATION OF EASEMENTS/27. Positive and negative easements.

27. Positive and negative easements.

A positive¹ or affirmative easement confers a right to commit some act upon the servient tenement. A negative² easement involves merely a right to prohibit the commission of certain acts upon the servient tenement which the servient owner would have been otherwise entitled to commit³. With regard to adverse user which, if continued, may give rise to a prescriptive claim to an easement, a positive or affirmative easement differs from a negative easement, for the adverse user in the case of an inchoate negative easement can in no circumstances be interrupted except by acts done upon the servient tenement, whereas the adverse user in the case of an inchoate affirmative easement, constituting as it does a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption⁴.

1 For examples of positive easements see PARA 33 post.

2 For examples of negative easements see PARA 32 post.

3 See *Phipps v Pears* [1965] 1 QB 76 at 82, [1964] 2 All ER 35 at 37, CA, per Lord Denning MR. There are however easements which are difficult to classify either as positive or negative: eg the right to cause that which, except for that right, would be a nuisance, or the right to invade some legal right: see PARAS 32, 34 post.

4 *Sturges v Bridgman* (1879) 11 ChD 852 at 864, CA, per Thesiger LJ.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(4) CLASSIFICATION OF EASEMENTS/28. Continuous and non-continuous easements.

28. Continuous and non-continuous easements.

A continuous easement is a right to do some act of a continuous and constant nature¹. The enjoyment of a non-continuous easement is intermittent, and consists of the commission of some act or of a series of acts².

1 *Pyer v Carter* (1857) 1 H & N 916; *Watts v Kelson* (1871) 6 Ch App 166 at 173; *Polden v Bastard* (1865) LR 1 QB 156 at 161, Ex Ch; *Worthington v Gimson* (1860) 2 E & E 618 at 625-626. The dicta of Channell B in *Hall v Lund* (1863) 1 H & C 676 at 685 apparently refer, not to a continuous easement, but to a continuous user of a right which is not an easement. See also *Pearson v Spencer* (1861) 1 B & S 571 at 583; affd (1863) 3 B & S 761, Ex Ch. A right of way is not a continuous easement (*Worthington v Gimson* supra; *Pheysey v Vicary* (1847) 16 M & W 484), unless over a formed road (*Brown v Alabaster* (1887) 37 ChD 490; *Borman v Griffith* [1930] 1 Ch 493).

2 Thus in *Suffield v Brown* (1864) 4 De GJ & Sm 185 an alleged right to project the bowsprits of ships in dock over the land of another owner was held not to be a continuous easement because there was no sign of the existence of the right except when a ship was actually in the dock with her bowsprit projecting beyond its limit.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(4) CLASSIFICATION OF EASEMENTS/29. Apparent and non-apparent easements.

29. Apparent and non-apparent easements.

An easement is apparent if its existence is evidenced by some apparent sign, whether that sign be patent to everyone or whether it can only be perceived on a careful inspection by a person ordinarily conversant with the subject¹. An easement is non-apparent if no external sign points to its existence². For apparenacy to be material the apparenacy must be on the servient tenement³.

1 *Pyer v Carter* (1857) 1 H & N 916 at 922, per Watson B; *Suffield v Brown* (1864) 4 De GJ & Sm 185 at 199; *Brown v Alabaster* (1887) 37 ChD 490. See further PARA 72 post.

2 *Suffield v Brown* (1864) 4 De GJ & Sm 185; *Wheeldon v Burrows* (1879) 12 ChD 31, CA.

3 *Schwann v Cotton* [1916] 2 Ch 120 at 141; affd [1916] 2 Ch 459, CA (underground pipe); applied in *Rance v Elvin* (1985) 50 P & CR 9, CA; see also *Hansford v Jago* [1921] 1 Ch 322 at 338 (strip of land not a formed roadway).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(4) CLASSIFICATION OF EASEMENTS/30. Easement of necessity.

30. Easement of necessity.

An easement of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case¹. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement², but one without which that tenement cannot be used at all³. Such an easement lasts only so long as the necessity exists⁴, for a grant arising out of the implication of necessity cannot be carried further than the necessity of the case requires⁵.

1 *Wheeldon v Burrows* (1879) 12 ChD 31, CA; *Holmes v Goring* (1824) 2 Bing 76 at 82. 'A way of necessity is not a defined way. A way of necessity is a way which is the most convenient access to a land-locked tenement over other property belonging to the grantor': *Brown v Alabaster* (1887) 37 ChD 490 at 500. See also *Nickerson v Barraclough* [1981] Ch 426, [1981] 2 All ER 369, CA; and PARA 165 post.

2 *Aldridge v Wright* [1929] 2 KB 117, CA.

3 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 573, CA, per Stirling LJ; *Ray v Hazeldine* [1904] 2 Ch 17.

4 *Holmes v Goring* (1824) 2 Bing 76; *Pearson v Spencer* (1863) 3 B & S 761 at 767, Ex Ch, per Erle CJ.

5 *Holmes v Goring* (1824) 2 Bing 76 at 82 per Best CJ.

UPDATE

30 Easement of necessity

NOTE 5--See also *Donaldson v Smith* [2007] WTLR 421; and PARA 65.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(5) EXAMPLES OF EASEMENTS/31. Particular easements.

(5) EXAMPLES OF EASEMENTS

31. Particular easements.

The most important and common easements are rights of way¹, support², water³, light⁴, air⁵ and parking motor vehicles⁶. There are numerous easements which do not fall within any of the foregoing classes. These may be classified⁷ as negative easements⁸, positive easements⁹ and easements to create nuisances¹⁰.

1 See PARA 156 et seq post.

2 See PARA 180 et seq post.

3 See PARA 197 et seq post.

4 See PARA 222 et seq post.

5 See PARA 249 et seq post.

6 See PARAS 252-253 post.

7 See PARA 26 ante.

8 See PARA 32 post.

9 See PARA 33 post.

10 See PARA 34 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(5) EXAMPLES OF EASEMENTS/32. Negative easements.

32. Negative easements.

The commonest forms of negative easements are the right of support to a building¹, the right to receive water flowing in an artificial watercourse², the right to light³ and the right to the passage of air through a defined channel⁴.

No easement can exist for the free access of wind⁵, to have a structure protected from the weather⁶, to insist upon the preservation of the prospect from property⁷ or to preserve privacy⁸. Likewise it appears that a right not to have television reception interfered with by the erection of a tall building cannot exist as an easement⁹.

1 See PARA 180 et seq post. The authorities are somewhat conflicting on the question whether the right of support to a building, whether lateral or vertical, is a positive or negative easement: see *Dalton v Angus* (1881) 6 App Cas 740, HL, where Lord Selborne LC described support as an 'easement not purely negative'. It appears from *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA, that the owner of the servient tenement has a positive duty to continue support where there is a natural right of support. Quaere whether the same principles would apply to an easement of support: see PARA 181 post. Cf the dicta of Lindley J in *Dalton v Angus* supra at 763, and Bowen J at 784; and see *Phipps v Pears* [1965] 1 QB 76 at 82, [1964] 2 All ER 35 at 37, CA, per Lord Denning MR.

2 See PARA 197 et seq post.

3 See PARA 222 et seq post.

4 See PARA 249 et seq post.

5 *Webb v Bird* (1862) 13 CBNS 841, Ex Ch; *Goodman and Gore's Case* (1613) Godb 189, cited in *Webb v Bird* (1861) 10 CBNS 268 at 273n.

6 *Phipps v Pears* [1965] 1 QB 76, [1964] 2 All ER 35, CA, applied in *Marchant v Capital and Counties Property Co Ltd* (1982) 263 Estates Gazette 661 (revsd [1983] 2 EGLR 156, 267 Estates Gazette 843, CA); but see *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541, [2001] 40 EG 163, CA; and PARA 186 the text and note 3 post.

7 *Aldred's Case* (1610) 9 Co Rep 57b at 58b; *Butt v Imperial Gas Co* (1866) 2 Ch App 158; *Harris v De Pinna* (1886) 33 ChD 238 at 262, CA; *Squire v Campbell* (1836) 1 My & Cr 459; *Smith v Owen* (1866) 14 WR 422; *A-G v Doughty* (1752) 2 Ves Sen 453; *Fishmongers' Co v East India Co* (1752) 1 Dick 163. See also *Leech v Schweder* (1874) 9 Ch App 463 at 474-475; *Browne v Flower* [1911] 1 Ch 219 at 225 per Parker J.

8 *Chandler v Thompson* (1811) 3 Camp 80; *Potts v Smith* (1868) LR 6 Eq 311; *Browne v Flower* [1911] 1 Ch 219 at 225 per Parker J.

9 See *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL, esp at 709 and at 454 per Lord Hoffmann. See also *Bridlington Relay Ltd v Yorkshire Electricity Board* [1965] Ch 436, [1965] 1 All ER 264; sed quaere whether this last decision is still good law in modern conditions.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(5) EXAMPLES OF EASEMENTS/33. Positive easements.

33. Positive easements.

The commonest positive easements are rights of way¹. Other positive easements are those entitling the dominant owner to park motor vehicles on the servient land, which is discussed later²; to place advertisement hoardings on another's land³; to fix a name plate⁴ or a sign board upon another's premises, and to subject the latter to the annoyance of the creaking caused by the signboard swinging in the wind⁵; to use a fascia on another's house for the purpose of painting his name and trade upon it⁶; to use an adjacent wall for the purpose of nailing trees to it⁷; to affix telephone wires to buildings⁸; to hang clothes lines over the servient tenement⁹; to mix manure on the servient tenement for the purposes of an adjoining farm¹⁰; to erect spoil banks on the servient tenement in the course of mining operations¹¹; to place stones or boulders on the servient tenement to prevent sand or earth being washed away by the encroachments of the sea¹²; to place a post in a river bed for the purpose of mooring in connection with a wharf¹³; to land nets on the servient tenement¹⁴; to allow the bowsprits of vessels in a dock to protrude over the servient tenement¹⁵; to use the area alongside a wharf for loading, unloading and breaking up vessels¹⁶; to maintain a hatch and fender in a river to control the force and direction of the water¹⁷; to maintain a weir and coop in a non-navigable river for the purpose of catching migratory fish¹⁸; to build so as to overhang the servient tenement¹⁹; to move a timber traveller over the servient tenement²⁰; to erect a signpost on a common²¹; to store goods on the servient tenement²²; to use a coal shed²³, or a kitchen for particular purposes²⁴, or a lavatory²⁵, or a pew in church²⁶; to make a vault in a parish church and use it for the purposes of burial²⁷; to pass water or effluent under the servient tenement by means of an artificial watercourse²⁸; to enter the servient tenement to open locks in time of flood²⁹ or repair an outside wall³⁰; to construct and maintain a ventilation duct³¹; to enjoy a pleasure ground³²; to receive a supply of gas³³; and to use land as a communal garden³⁴.

It has, however, been held that there is no easement entitling a dominant owner to overhang the servient tenement with trees³⁵; to exercise exclusive right to use boats on a canal³⁶; to conduct horse races³⁷ or deposit and repair vehicles on the servient tenement³⁸; to maintain silt over the area alongside a wharf³⁹; or to exercise the exclusive use of a cellar⁴⁰.

1 See PARA 156 et seq post.

2 See PARAS 252-253 post.

3 *R v St Pancras Assessment Committee* (1877) 2 QBD 581 at 586-587. See also *Henry Ltd v M'Glade* [1926] NI 144, CA (right of advertisement by man holding board at entrance of arcade leading to the premises).

4 *Lane v Dixon* (1847) 3 CB 776.

5 *Moody v Steggles* (1879) 12 ChD 261; *William Hill (Southern) Ltd v Cabras Ltd* (1987) 54 P & CR 42, [1987] 1 EGLR 37, CA; *P & S Platt v Crouch* [2003] EWCA Civ 1110, 147 Sol Jo LB 934, [2003] All ER (D) 440.

6 *Francis v Hayward* (1882) 22 ChD 177 at 182, CA, *semble*, though the actual decision was that the plaintiff (now known as the 'claimant': see CIVIL PROCEDURE) was entitled to the fascia not as a mere easement, but as part of the tenement demised to him. See also *William Hill (Southern) Ltd v Cabras Ltd* (1987) 54 P & CR 42, [1987] 1 EGLR 37, CA.

7 *Hawkins v Wallis* (1763) 2 Wils 173; *Simpson v Weber* (1925) 133 LT 46 (right of support of creeper).

8 *Lancashire Telephone Co v Manchester Overseers* (1884) 14 QBD 267 at 272, CA.

- 9 *Drewell v Towler* (1832) 3 B & Ad 735, where, however, it was held that the right claimed was wider than the right proved; Lord Tenterden CJ refused to allow the plaintiff to amend in as much as he would not be precluded by the judgment from bringing another action if he was interrupted in the enjoyment of the limited right.
- 10 *Pye v Mumford* (1848) 11 QB 666, where, however, the right was claimed as a profit à prendre.
- 11 *Rogers v Taylor* (1857) 1 H & N 706; *Earl of Cardigan v Armitage* (1823) 2 B & C 197; see also *Marshall v Borrowdale Plumbago Mines and Manufacturing Co* (1892) 8 TLR 275; *Taff Vale Rly Co v Cardiff Rly Co* [1917] 1 Ch 299 at 317, CA, per Scrutton LJ.
- 12 *Philpot v Bath* (1905) 21 TLR 634, CA.
- 13 *Lancaster v Eve* (1859) 5 CBNS 717; see also *Cory v Bristow* (1875) 1 CPD 54, CA; affd (1877) 2 App Cas 262, HL; *P & S Platt Ltd v Crouch* [2003] EWCA Civ 1110, 147 Sol Jo LB 934, [2003] All ER (D) 440 (Jul).
- 14 *Gray v Bond* (1821) 2 Brod & Bing 667.
- 15 *Suffield v Brown* (1864) 33 LJ Ch 249.
- 16 *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep 472, CA.
- 17 *Wood v Hewett* (1846) 8 QB 913; see also *Moody v Steggles* (1879) 12 ChD 261 at 266.
- 18 *Leconfield v Lonsdale* (1870) LR 5 CP 657; *Rolle v Whyte* (1868) LR 3 QB 286; and see *Wood v Hewett* (1846) 8 QB 913.
- 19 *Lemmon v Webb* [1894] 3 Ch 1 at 18, CA, per Kay LJ; affd [1895] AC 1, HL.
- 20 *Harris v De Pinna* (1886) 33 ChD 238, CA.
- 21 *Hoare v Metropolitan Board of Works* (1874) LR 9 QB 296; see also *Hoare & Co Ltd v Lewisham Corpn* (1901) 85 LT 281; affd (1902) 87 LT 464, CA.
- 22 *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, PC.
- 23 *Wright v Macadam* [1949] 2 KB 744, [1949] 2 All ER 565, CA.
- 24 *Heywood v Mallalieu* (1883) 25 ChD 357.
- 25 *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA.
- 26 *Mainwaring v Giles* (1822) 5 B & Ald 356 at 361; *Dawney v Dee* (1620) Cro Jac 605; *Brumfitt v Roberts* (1870) LR 5 CP 224 at 233, where the court described a right to sit in a pew as not an interest in land but an interest of a peculiar nature in the nature of an easement (applied in *Re St Mary's, Banbury* [1987] Fam 136, [1987] 1 All ER 247, Arches Ct). See also *Greenway v Hockin* (1870) LR 5 CP 235; *Phillips v Halliday* [1891] AC 228, HL; *Stileman-Gibbard v Wilkinson* [1897] 1 QB 749, and ECCLESIASTICAL LAW.
- 27 *Bryan v Whistler* (1828) 8 B & C 288; see also *Moreland v Richardson* (1856) 22 Beav 596; *Moreland v Richardson* (1857) 24 Beav 33; as to vaults in public cemeteries see *Hoskyns-Abrahall v Paignton UDC* [1928] Ch 671; affd [1929] 1 Ch 375, CA (limits on access to vault in cemetery under what is now the Local Authorities' Cemeteries Order 1977, SI 1977/204 (as amended): see CREMATION AND BURIAL vol 10 (Reissue) PARA 1068). As to churchways see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 637.
- 28 *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA; *Simmons v Midford* [1969] 2 Ch 415, [1969] 2 All ER 1269.
- 29 *Simpson v Godmanchester Corpn* [1897] AC 696, HL.
- 30 *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609. See *Williams v Usherwood* (1983) 45 P & CR 235, CA, where the defendants had acquired a possessory title to the surface of the land as against the plaintiffs. It was held that this did not dispossess the plaintiffs of the eaves or other projections of their house over it and was subject to a right in the nature of an easement for the plaintiffs to enter on the land for maintenance of their house: see now the Access to Neighbouring Land Act 1992; and PARA 112 et seq post.
- 31 *Wong v Beaumont Property Trust Ltd* [1965] 1 QB 173, [1964] 2 All ER 119, CA.

32 *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 153, [1955] 3 All ER 667, CA (the *jus spatiandi*).

33 *Coopind (UK) Ltd v Walton Commercial Group Ltd* [1989] 1 EGLR 241 (held to mean a right to receive gas in such quantities and at such pressures as the claimant might from time to time reasonably require by whatever routes might from time to time reasonably be needed to convey the supply).

34 *Jackson v Mulvaney* [2002] EWCA Civ 1078, [2003] 1 WLR 360, sub nom *Mulvaney v Gough* [2003] 4 All ER 83.

35 *Lemmon v Webb* [1894] 3 Ch 1, CA; affd [1895] AC 1, HL.

36 *Hill v Tupper* (1863) 2 H & C 121.

37 *Mounsey v Ismay* (1865) 3 H & C 486.

38 *Copeland v Greenhalf* [1952] Ch 488, [1952] 1 All ER 809. See also *Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 4 All ER 78, [2003] 1 WLR 764.

39 *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep 472, CA.

40 *Grigsby v Melville* [1973] 1 All ER 385, [1972] 1 WLR 1355; affd [1973] 3 All ER 455, [1974] 1 WLR 80, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(5) EXAMPLES OF EASEMENTS/34. Easements to create nuisances.

34. Easements to create nuisances.

The right to use land or buildings in such manner as but for that right would constitute a private nuisance to other particular land or buildings of different ownership may constitute an easement. Accordingly, a person may have an easement entitling him to create upon the dominant tenement what would otherwise constitute a nuisance by, for example discharging gases, fluids, noxious odours¹ or coal dust², or sending smoke over his neighbour's tenement³; making noises which are so audible to the servient owner that they would, but for the easement, cause an actionable nuisance⁴; creating vibrations and disturbances upon his tenement which, but for that easement, that person would not be allowed to create⁵; passing smoke through the flues of the servient tenement from the fires on the dominant tenement⁶; and discharging rainwater by a spout or from eaves upon the servient tenement⁷.

To constitute an easement the authorised user must be such that but for the authorisation the user would be a wrongful nuisance⁸. Ordinarily where the form of user is expressly conferred, however, and such user is possible without creating what would otherwise be an actionable nuisance or wrong, the grant is deemed to be limited to that user⁹.

The grant of an easement to create a nuisance would not affect proceedings under the Environmental Protection Act 1990¹⁰.

1 *Bliss v Hall* (1838) 4 Bing NC 183 at 186 per Tindal CJ. See also *Green v Lord Somerleyton* [2003] EWCA Civ 198, [2003] 10 LS Gaz R 31, [2003] All ER (D) 426 (Feb) (drainage easement).

2 *Royal Mail Steam Packet Co v George and Branday* [1900] AC 480, PC.

3 *Crump v Lambert* (1867) LR 3 Eq 409 at 413; on appeal (1867) 17 LT 133.

4 *Crump v Lambert* (1867) LR 3 Eq 409 at 413; on appeal (1867) 17 LT 133; *Elliotson v Feetham* (1835) 2 Bing NC 134; cf *Mumford v Oxford, Worcester and Wolverhampton Rly Co* (1856) 1 H & N 34. See generally *Soltau v De Held* (1851) 2 Sim NS 133; *Rushmer v Polsue and Alfieri Ltd* [1906] 1 Ch 234, CA; affd on the facts sub nom *Polsue and Alfieri Ltd v Rushmer* [1907] AC 121, HL.

5 *Sturges v Bridgman* (1879) 11 ChD 852, CA; *Lyttelton Times Co Ltd v Warners Ltd* [1907] AC 476, PC; *Rushmer v Polsue and Alfieri Ltd* [1906] 1 Ch 234, CA; affd on the facts sub nom *Polsue and Alfieri Ltd v Rushmer* [1907] AC 121, HL. See also *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 648, HL, per Lord Parker. Cf *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), [2003] NLJR 634, [2003] All ER (D) 300 (Apr) (no prescriptive right to commit nuisance by flying military aircraft whose noise exceeded decibel ratings guidelines set out by World Health Organisation and against which neighbouring landowners had made a number of complaints).

6 *Jones v Pritchard* [1908] 1 Ch 630; *Hervey v Smith* (1856) 22 Beav 299.

7 *Harvey v Walters* (1873) LR 8 CP 162; *Thomas v Thomas* (1835) 2 Cr M & R 34.

8 *Liverpool Corpn v H Coghill & Son Ltd* [1918] 1 Ch 307.

9 *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, HL (trade of miner); *Priest v Manchester Corpn* (1915) 84 LJB 1734 (tipping ground); *A-G v Cory Bros & Co, Kennard v Cory Bros & Co* [1921] 1 AC 521, HL. See also *Gardner v Davis* [1999] EHLR 13, [1998] 29 LS Gaz R 28, CA (dominant owner did not have a defence, by virtue of his easement of drainage, to a nuisance claim by the servient owner concerning raw sewage flooding the servient land where the septic tank was inadequate to cope with the increase in water usage due to modern day use).

10 As to statutory nuisance see the Environmental Protection Act 1990 s 79 (as amended); and NUISANCE vol 78 (2010) PARA 156.

UPDATE

34 Easements to create nuisances

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/35. Ownership and exclusive use.

(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS

35. Ownership and exclusive use.

An easement does not give the dominant owner the exclusive or unrestricted use of any part of the servient tenement¹. The grant of exclusive and unrestricted use of a piece of land passes the property or ownership in that land and not merely an easement in it². A right which amounts in effect to the whole beneficial user of the servient tenement to the exclusion of the owner or to a joint user of the servient tenement, or which would prevent the servient owner from making ordinary use of his land, cannot take effect as an easement either by virtue of a grant or by prescription³. Such a right, however, if granted by deed may be enforced under the doctrine of non-derogation from grant⁴. Whether or not a right asserted amounts to a claim to the whole beneficial user of the servient tenement is a question of law to be determined in accordance with all the facts of the particular case; the problem is one of degree⁵. The grant of the exclusive use of pipes or wires is, however, an easement⁶. So also, apparently, is the grant of the exclusive use of a burial vault⁷.

1 *Reilly v Booth*(1890) 44 ChD 12 at 26, CA; *Capel v Buszard* (1829) 6 Bing 150 at 159; *Holywell Union and Halkyn Parish v Halkyn Drainage Co*[1895] AC 117, HL; *Southport Corpn v Ormskirk Union Assessment Committee*[1894] 1 QB 196 at 201, CA. Cf *Phelps v London Corpn*[1916] 2 Ch 255. The appropriation from time to time of a small part of the soil of the servient tenement may necessarily be involved in the rightful enjoyment of the easement: see *Holywell Union and Halkyn Parish v Halkyn Drainage Co* supra; *Taff Vale Rly Co v Cardiff Rly Co*[1917] 1 Ch 299 at 316, CA. For the meaning of 'dominant owner' and 'servient tenement' see PARA 2 ante.

2 *Reilly v Booth*(1890) 44 ChD 12, CA; *Capel v Buszard* (1829) 6 Bing 150. Cf *London Taverns Co v Worley* (1888) cited in 44 ChD at 18, 24.

3 As to a grant see *Re Ellenborough Park*, *Re Davies*, *Powell v Maddison*[1956] Ch 131 at 153, [1955] 3 All ER 667, CA; *Miller v Emcer Products Ltd*[1956] Ch 304, [1956] 1 All ER 237, CA; *Wright v Macadam*[1949] 2 KB 744, [1949] 2 All ER 565, CA; *Grigsby v Melville*[1973] 1 All ER 385, [1972] 1 WLR 1355; affd [1973] 3 All ER 455, [1974] 1 WLR 80, CA. As to prescription see *Dyce v Lady Hay* (1852) 1 Macq 305, HL; *Copeland v Greenhalf*[1952] Ch 488, [1952] 1 All ER 809; *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep 472, CA. See also *A-G for Southern Nigeria v John Holt & Co (Liverpool) Ltd*[1915] AC 599, PC; *Ward v Kirkland*[1967] Ch 194, [1966] 1 All ER 609; *Hanina v Morland*[2000] All ER (D) 1931, [2000] PLSCS 261, CA (claim to exclusive use of roof terrace not capable of being an easement); *Jackson v Mulvaney*[2002] EWCA Civ 1078, [2003] 1 WLR 360, sub nom *Mulvaney v Gough*[2003] 4 All ER 83 (easement created by use of land as communal garden only restricted servient owner's use to extent necessary to ensure continued use of land as such garden).

4 See *Copeland v Greenhalf*[1952] Ch 488 at 498, [1952] 1 All ER 809 at 813; *Ward v Kirkland*[1967] Ch 194 at 226, [1966] 1 All ER 609 at 617; *P & S Platt Ltd v Crouch* [2003] EWCA Civ 1110, 147 Sol Jo LB 934, [2003] All ER (D) 440 (Jul); and the cases cited in para 253 post.

5 *Grigsby v Melville*[1973] 1 All ER 385 at 392, [1972] 1 WLR 1355 at 1364 per Brightman J; affd [1973] 3 All ER 455, [1974] 1 WLR 80, CA.

6 *Simmons v Midford*[1969] 2 Ch 415, [1969] 2 All ER 1269 (grant of the right to lay and maintain drains vests ownership of the drains in the grantee as appurtenant to the grantee's land; in any event, even if drains are annexed as realty to the servient land, the grantee is entitled to their exclusive use). See also *Southport Corpn v Ormskirk Union Assessment Committee*[1894] 1 QB 196, CA. Cf *Taylor v St Helens Corpn*(1877) 6 ChD 264, CA (watercourse); *Finlinson v Porter*(1875) LR 10 QB 188, DC; *Hill v Midland Rly Co*(1882) 21 ChD 143; *Bevan v London Portland Cement Co* (1892) 67 LT 615.

7 See the authorities cited in para 33 note 27 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/36. Restrictive covenants.

36. Restrictive covenants.

Where a covenant (other than one between lessor and lessee) which is in substance restrictive of the user of the covenantor's land is entered into in such form as to bind his successors in title and enure for the successors in title of the covenantee's land, it is sometimes said that the covenantor's land thereby becomes a servient tenement, the covenantee's land a dominant tenement, and the covenant itself a negative equitable easement¹. Two features, however, distinguish this relationship from an easement. First, the subject matter of such a covenant is not sufficiently definite to be capable of grant, which is an essential requisite of every easement although blurred in the case of negative easements such as access of light and air². Secondly, though it may exist as an equitable interest an easement is usually a legal easement and as such binds all the world, subject to the qualifications in the case of registered land contained in the Land Registration Act 2002³. A restrictive covenant, however, can only exist as an equitable interest and in principle therefore will be defeated by a bona fide purchaser for value of a legal estate without notice, actual or constructive, of the restrictive covenant. The law as to notice was modified by the 1925 property legislation⁴ and in registered conveyancing a restrictive covenant could formerly be protected by notice under the Land Registration Act 1925⁵ and can now be protected by notice under the Land Registration Act 2002⁶.

1 See *Re Nisbet and Potts' Contract* [1906] 1 Ch 386, CA; and see EQUITY. In *London and South Western Rly v Gomm* (1992) 20 ChD 562 at 583, CA, Jessel MR referred to the then relatively new doctrine of restrictive covenants as being 'either an extension in equity of the doctrine of *Spencer's Case* (1583) 5 Co Rep 16a to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light ...'.

2 The distinction is a fine one, so much so that in some common law jurisdictions overseas these negative easements, valid as such in England and Wales, are not recognised as easements but are governed by the law relating to covenants.

3 See PARA 62 post.

4 I.e. as from 1 January 1926: see the Law of Property Act 1925 s 198 (as amended), s 199; the Land Charges Act 1972 ss 2, 4 (as amended); see also the Law of Property Act 1969 ss 24, 25 (as amended); the Land Charges Act 1972 ss 16(1)(j), (k), 18(3), Sch 5; and see EQUITY vol 16(2) (Reissue) PARA 577 et seq; LAND CHARGES.

5 I.e. under the Land Registration Act 1925 s 50 (repealed).

6 See the Land Registration Act 2002 s 32, which came into force on 13 October 2003 (Land Registration Act 2002 (Commencement No 4) Order 2003, SI 2003/1725, art 2); and LAND REGISTRATION.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/37. Licences.

37. Licences.

The chief distinction between an easement and a licence¹ to use land in a particular manner is that whereas an easement cannot be extinguished merely at the will of the grantor, except in the modes mentioned later², a licence is generally revocable at the will of the person who has given it. More precisely, the common law view is that a bare licence, even if under seal or made for valuable consideration, is revocable at any time on reasonable notice³, but a licence coupled with a proprietary interest in land or chattels is irrevocable until the purpose for which the licence was given has been fulfilled⁴. Equity, however, recognised the possibility of an irrevocable licence entirely divorced from the grant of any interest of a proprietary nature⁵. An injunction could be granted to restrain a breach and in an appropriate case specific performance could be obtained⁶. The equitable view does not, however, alter the position that a licence is merely personal⁷. It does not run with the land and not even a purchaser with notice is bound by it⁸. Further, a deed is generally necessary to grant an easement⁹, but unnecessary to give a licence¹⁰.

1 le a licence properly so called. See *IDC Group Ltd v Clark* (1992) 65 P & CR 179, [1992] 2 EGLR 184, CA (words 'grant a licence' in a professionally drafted deed created a licence, not an easement). As to the development of the licence in equity see PARA 39 post; and EQUITY.

2 As to the modes in which easements may be lost or destroyed, and generally as to the extinguishment of easements, see PARA 122 post.

3 *Minister of Health v Bellotti* [1944] KB 298, [1944] 1 All ER 238, CA; *GLC v Jenkins* [1975] 1 All ER 354, [1975] 1 WLR 155, CA; and see *Fentiman v Smith* (1803) 4 East 107 at 109; *Cocker v Cowper* (1834) 1 Cr M & R 418; *Hyde v Graham* (1862) 1 H & C 593; *Taplin v Florence* (1851) 10 CB 744; *Whipp v Mackey* [1927] IR 372; *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA. See however *Winter v Brockwell* (1807) 8 East 308; *Adams v Andrews* (1850) 15 QB 284. However if A gives authority to B for the doing of an act on his land, and the act is done and completed, then whatever the description of that authority, it is generally far too late for A to complain: *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA; *Liggins v Inge* (1831) 7 Bing 682 (see also *Taylor v Waters* (1816) 7 Taunt 374, expressing a wider principle but said to be 'in the last degree unsatisfactory' in *Wood v Leadbitter* (1845) 13 M & W 838 and *Wallis v Harrison* (1838) 4 M & W 538). The revocation of a licence may give rise to a claim for damages: *Kerrison v Smith* [1897] 2 QB 445. An agreement to allow posters to be affixed to a building for a term of years at a rent creates a licence only and not an easement: *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54, HL. As to licences in relation to land see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 9 et seq; MINES, MINERALS AND QUARRIES; TORT.

4 *Wood v Leadbitter* (1845) 13 M & W 838; *Hurst v Picture Theatres Ltd* [1915] 1 KB 1, CA.

5 *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL; *Hounslow London Borough Council v Twickenham Garden Developments* [1971] Ch 233, [1970] 3 All ER 326.

6 *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA; and see *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA. Revocation of a licence may give rise to a claim for damages: *Kerrison v Smith* [1897] 2 QB 445.

7 *Cocker v Cowper* (1834) 1 Cr M & R 418; *Wood v Leadbitter* (1845) 13 M & W 838. Cf *Smart v Jones* (1864) 15 CBNS 717; *Russell v Harford* (1866) LR 2 Eq 507; *Brown v Metropolitan Counties Life Assurance Society* (1859) 1 E & E 832; *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193, CA; *National Provincial Bank v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, HL; *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA (as to which see note 8 infra).

8 *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54, HL; *National Provincial Bank v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, HL. Note, however, that a licence may give rise to a constructive trust which may

bind a third party on ordinary trust principles (see *Binions v Evans* [1972] Ch 359, [1972] 2 All ER 70, CA; *Lys v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044; *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA (overruled without affecting this principle by *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL)) or proprietary estoppel (see PARA 39 post; and ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq).

9 A deed is necessary for the grant of a legal easement: see the Law of Property Act 1925 s 52(1). See also *Cocker v Cowper* (1834) 1 Cr M & R 418; *Hewlins v Shippam* (1826) 5 B & C 221 at 229, per Bayley J; *Bird v Higginson* (1835) 4 Nev & M KB 505; affd (1837) 6 Ad & El 824; *Wood v Leadbitter* (1845) 13 M & W 838 at 842-843 per Alderson B; *Perry v Fitzhowe* (1846) 8 QB 757 at 778; *Bryan v Whistler* (1828) 8 B & C 288; *Adams v Andrews* (1850) 15 QB 284; *Roffey v Henderson* (1851) 17 QB 574; *McManus v Cooke* (1887) 35 ChD 681; *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA; and see generally para 51 post.

10 *Taylor v Waters* (1816) 7 Taunt 374; *Winter v Brockwell* (1807) 8 East 308; *R v Horndon-on-the-Hill Inhabitants* (1816) 4 M & S 562; *Hewlins v Shippam* (1826) 5 B & C 221.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/38. Non-derogation from grant.

38. Non-derogation from grant.

If a grant of land is made for a particular purpose the grantor comes under an obligation not to use the land retained by him in such a way as to render the land granted unfit or materially less fit for the particular purpose for which the grant was made¹. The principle underlying the rule is that a grantor, having given a thing with one hand, is not to take away the means of enjoying it with the other². The rule is not limited to those rights capable of existing as easements³ although frequently it does apply to easements properly so-called⁴; whether it extends to positive as well as negative rights is not clear⁵.

The principle of non-derogation from grant has no application where land is being purchased compulsorily⁶.

1 *Browne v Flower* [1911] 1 Ch 219 at 226 per Parker J; *Molton Builders Ltd v City of Westminster London Borough Council* (1975) 30 P & CR 182, 119 Sol Jo 627, CA; *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264, CA.

2 *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 ChD 295 at 313, CA, per Bowen LJ. See also *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 607; *Woodhouse & Co Ltd v Kirkland (Derby) Ltd* [1970] 2 All ER 587, [1970] 1 WLR 1185. As to the factors to be taken into consideration when determining liability for derogation from grant of lease see *Platt v London Underground Ltd* [2001] 2 EGLR 121, [2001] All ER (D) 257 (Feb).

3 Cf *Copeland v Greenhalf* [1952] Ch 488 at 498, [1952] 1 All ER 809 at 813 per Upjohn J.

4 Eg under the rule in *Wheeldon v Burrows* (1879) 12 ChD 31, CA, which is a branch of the general rule: see PARA 63 et seq post.

5 Cf *Ward v Kirkland* [1967] Ch 194 at 227, [1966] 1 All ER 609 at 617 per Ungood-Thomas J, and *Woodhouse & Co Ltd v Kirkland (Derby) Ltd* [1970] 2 All ER 587 at 593, [1970] 1 WLR 1185 at 1193 per Plowman J.

6 *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, [1977] 2 All ER 385, HL (but see the Local Government (Miscellaneous Provisions) Act 1976 s 13 (as amended), cited in para 47 note 5 post).

UPDATE

38 Non-derogation from grant

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/39. Equities.

39. Equities.

A variety of proprietary and quasi-proprietary rights and interests in or over land are enforced in equity, some of which are sometimes referred to as equitable easements, though they should more correctly be called mere equities, since they are not easements within the strict statutory meaning of the term¹. Their only common characteristic is that (whether or not they are also capable of being created as legal or equitable easements) they are enforced primarily because of the view equity takes of the dealings between the 'dominant' and the 'servient' owners. Such equities are thus enforced under the equitable doctrines of specific performance, or by reason of for example informal agreement, representations inducing reliance, acquiescence, reciprocity or mutual benefit and burden, and estoppel². They are not equitable easements³ within the meaning of the Land Charges Act 1972. In the case of unregistered land it seems that they are capable of binding a third party who is not a bona fide purchaser of a legal estate without notice⁴. In the case of registered land, under the Land Registration Act 1925 such rights appear to have been overriding interests⁵. Under the Land Registration Act 2002 it is now provided that both an equity by estoppel and a mere equity have effect from the time the equity arises as an interest capable of binding successors in title, subject to the rules⁶ about the effect of dispositions on priority⁷. They may be protected by the entry of a notice in the register⁸.

¹ See PARA 6 ante.

² *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA (estoppel); *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371; and *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA (reciprocity); *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA; and *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609 (expenditure in reliance on consent); *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA (proprietary estoppel); *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n, [1981] 1 All ER 897; *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA; *Valentine v Allen* [2003] EWCA Civ 915, [2003] All ER (D) 79 (Jul), [2003] PLSCS 161 (estoppel). See also *Poster v Slough Estates Ltd* [1969] 1 Ch 495, [1968] 3 All ER 257; *Shiloh Spinners Ltd v Harding* [1972] Ch 326, [1971] 2 All ER 307, CA; revsd [1973] 1 All ER 90, HL; and see EQUITY. For cases decided prior to 1926 see *Duke of Devonshire v Eglin* (1851) 14 Beav 530 (express permission not under seal to carry conduit through land; landowner enjoined from interfering nine years later); *McManus v Cooke* (1887) 35 ChD 681; *Dalton v Angus* (1881) 6 App Cas 740 at 765, 782, HL; *Moreland v Richardson* (1856) 22 Beav 596; *Laird v Birkenhead Rly Co* (1859) John 500; *Mold v Wheatcroft* (1859) 27 Beav 510; *Carr v Benson* (1868) 3 Ch App 524; *Newby v Harrison* (1861) 1 John & H 393; *Bankart v Tennant* (1870) LR 10 Eq 141; *Cory v Davies* [1923] 2 Ch 95. Cf *Cocker v Cowper* (1834) 1 Cr M & R 418; *Fentiman v Smith* (1803) 4 East 107; *Clavering's Case* (prior to 1800) cited in 5 Ves 690; *Cotching v Bassett* (1862) 32 Beav 101; *Plimmer v Wellington Corpn* (1884) 9 App Cas 699 at 710, PC; *Rochdale Canal Co v King* (1853) 16 Beav 630; *East India Co v Vincent* (1740) 2 Atk 83. See also *Wood v Lake* (1751) Say 3; *East Barnet Valley UDC v Stallard* [1909] 2 Ch 555, CA; *Grand Hotel, Eastbourne Ltd v White* (1913) 84 LJ Ch 938, HL. For the application of the same principle to profits à prendre see *Mason v Clarke* [1955] AC 778, [1955] 1 All ER 914, HL; and PARA 270 post.

³ See PARA 6 note 6 ante.

⁴ *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA; *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 721, [1973] 1 All ER 90 at 99, HL, per Lord Wilberforce.

⁵ *Celsteel Ltd v Alton House Holdings Ltd* [1985] 2 All ER 562, [1985] 1 WLR 204 (revsd in part, but not on this point, [1986] 1 All ER 608, [1986] 1 WLR 512, CA); *Thatcher v Douglas* [1996] NPC 206, [1996] NJLR 282, CA.

6 The rules referred to in the text are the rules contained in the Land Registration Act 2002 ss 28-31: see LAND REGISTRATION.

7 See *ibid* s 116; and EQUITY vol 16(2) (Reissue) PARA 567; LAND REGISTRATION.

8 See *ibid* s 32; and LAND REGISTRATION.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/40. Natural rights.

40. Natural rights.

Every owner of land enjoys as an incident arising by law from the ownership of his land, and in addition to his rights over his own land, certain rights which are generally called natural rights arising *jure naturae*. An easement is a right enjoyed over and above the natural rights and the burden of an easement involves, in general, a diminution of, or detraction from, the natural rights of the servient tenement¹. Every owner has a natural right to support² and to water³. There is no natural right to light⁴ or to air⁵.

1 *Wright v Howard* (1823) 1 Sim & St 190.

2 See PARA 180 post.

3 See PARA 199 post.

4 See PARA 222 post.

5 See PARA 249 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/41. Local customary rights.

41. Local customary rights.

Easements are also distinguishable from rights which exist in particular localities under special local customs, whereby undefined and fluctuating bodies of people are entitled to utilise the land of another person in a particular manner and for a particular purpose. Although such rights are analogous to easements they cannot exist as easements for easements lie in grant and a grant cannot be made to a fluctuating body of persons. Further, such rights exist independently of the ownership of a dominant tenement¹.

¹ As to customary rights in the land of another (rights *in alieno solo*) see CUSTOM AND USAGE vol 12(1) (Reissue) PARA 629.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/42. Public rights.

42. Public rights.

An easement is a private proprietary privilege appurtenant to a dominant tenement and, apart from statute, must be founded against common right on a grant express, implied in a transaction or presumed from long user by prescription. By contrast a public right is enjoyed of common right by all the Crown's subjects, irrespective of any interest they may have in a tenement. The distinction is chiefly relevant to a right of way¹. Whether this is a public highway or a private easement is a question of fact largely depending on reputation². A highway arises from dedication to the public of the surface for the purpose of passage over it, but the occupation of the site of an easement of way remains in the servient owner subject only to the easement or privilege of the dominant owner³. The terminus ad quem of an easement of way may be and frequently is a point on a highway. An easement of way may co-exist with a highway over the same site, and extinguishment of the public right does not affect the private right⁴.

1 *Rangeley v Midland Rly Co* (1868) 3 Ch App 306; *Hawkins v Rutter* [1892] 1 QB 668 at 671, DC.

² *Austin's Case* (1672) 1 Vent 189; and see *Barraclough v Johnson* (1838) 8 Ad & El 99; *Nicholls v Parker* 1805) 14 East 331n.

3 *Austin's Case* (1672) 1 Vent 189; *Senhouse v Christian* (1787) 1 Term Rep 560 at 570. See HIGHWAYS, STREETS AND BRIDGES.

4 *Walsh v Oates* [1953] 1 QB 578, [1953] 1 All ER 963, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/43. Statutory rights over land.

43. Statutory rights over land.

A true easement appurtenant to a dominant tenement can be created by statute¹, but many anomalous rights over another's land are created by or under authority of statute which, although not easements within the strict meaning of the term, are frequently spoken of as such². These so-called statutory easements may be appurtenant only to some enterprise or may exist irrespective of any dominant tenement at all. Statute may also confer on strangers the right to use an existing easement in common with its existing rightful owner. Examples of such statutory rights are running powers of railway undertakings, being running powers over land not owned by the railway undertaking³; wayleaves above and below ground⁴; and the right to construct such things as tunnels, drains, pipes and pipelines.

¹ See PARA 47 post.

² *Great Western Rly Co v Swindon and Cheltenham Extension Rly Co* (1882) 22 ChD 677 at 702, 706, CA; affd (1884) 9 App Cas 787, HL.

³ *Great Western Rly Co v Swindon and Cheltenham Extension Rly Co* (1882) 22 ChD 677, CA; affd (1884) 9 App Cas 787, HL; *Rangeley v Midland Rly Co* (1868) 3 Ch App 306; *Midland Rly Co v Great Western Rly Co* [1909] AC 445, HL; and see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES.

⁴ As to wayleaves for the installation and keeping of electric lines over private land see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1292 et seq.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/44. Profits à prendre.

44. Profits à prendre.

The chief distinction between an easement and a profit à prendre is that whereas an easement only confers a right to utilise the servient tenement in a particular manner or to prevent the commission of some act on that tenement¹, a profit à prendre confers a right to take from the servient tenement some part of the soil of that tenement or minerals under it or some part of its natural produce or the wild animals (animals *ferae naturae*) existing upon it². What is taken must be capable of ownership, for otherwise the right amounts to a mere easement³.

1 For the meaning and characteristics of profits à prendre see PARA 254 et seq post. In *Pye v Mumford* (1848) 11 QB 666 a right of using a close for mixing manure brought upon the land was treated as a profit à prendre, although clearly it was an easement.

2 *Race v Ward* (1855) 4 E & B 702 at 709 per Lord Campbell CJ (water rising from a spring 'is no part of the soil, like sand, or clay, or stones; nor the produce of the soil, like grass or turves, or trees; they all come under the category of profit à prendre, being part of the soil or the produce of the soil'); *Blewett v Tregonning* (1835) 3 Ad & El 554 (drifted sand); *Earl De La Warr v Miles* (1881) 17 ChD 535 at 577, CA; *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 484, CA; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 482, [1967] 1 All ER 833 at 851, CA; *White v Taylor (No 2)* [1969] 1 Ch 160 at 177, [1968] 1 All ER 1015 at 1023. See also *Peers v Lucy* (1694) 4 Mod Rep 362; *Robins v Barnes* (1615) Hob 131; and *Lord v Sydney City Comrs* (1859) 12 Moo PCC 473.

3 *Race v Ward* (1855) 4 E & B 702; *Weekly v Wildman* (1698) 1 Ld Raym 405 at 407; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 482, [1967] 1 All ER 833 at 851, CA; *White v Taylor (No 2)* [1969] 1 Ch 160 at 177, [1968] 1 All ER 1015 at 1023.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/1. NATURE AND CHARACTERISTICS OF EASEMENTS/(6) DISTINCTION BETWEEN EASEMENTS AND OTHER RIGHTS/45. Right to have fences maintained.

45. Right to have fences maintained.

The law recognises a right to require the owner of adjoining land to keep a boundary fence in repair. The obligation to maintain such a fence is capable of running with the land as servient tenement in favour of the neighbouring land as dominant tenement. The right is not an easement strictly so-called because it involves the servient owner in the expenditure of money. It is an anomalous right of ancient origin and is variously described as a spurious easement, a quasi-easement and a right in the nature of an easement, but such descriptions involve a confusion of concepts and the right should properly be regarded as *sui generis*¹. The right can be created by statute and, lying in grant, can arise by prescription at common law². Notwithstanding that it lies in grant, it is doubtful whether the right can still be created by deed or can arise under the doctrine of lost modern grant³. The right is of such a nature that it passes by statute⁴ on a conveyance⁵.

There is no right capable of running with land in law or in equity whereby the dominant owner is entitled to have an internal fence on the dominant tenement maintained by the owner of an adjacent servient tenement⁶.

1 *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA.

2 *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA; *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, CA. As to whether or not the right can arise by custom see *Egerton v Harding* [1975] 1 QB 62, [1974] 3 All ER 689, CA, disapproving dicta in *Jones v Price* supra and *Crow v Wood* supra.

3 *Jones v Price* [1965] 2 QB 618 at 639-640, [1965] 2 All ER 625 at 634, CA, per Diplock LJ. But once there is established an immemorial usage of fencing as matter of obligation the duty to fence is proved provided it can be shown that such a duty could have arisen from a lawful origin: *Egerton v Harding* [1975] QB 62 at 71, [1974] 3 All ER 689 at 694, CA, per Scarman LJ.

4 *Ie* under the Law of Property Act 1925 s 62(1): see PARA 57 post.

5 *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, CA.

6 *Jones v Price* [1965] 2 QB 618 at 639, [1965] 2 All ER 625 at 633, CA, per Diplock LJ.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(1) IN GENERAL/46. Easement must be created by grant or statute.

2. CREATION OF EASEMENTS

(1) IN GENERAL

46. Easement must be created by grant or statute.

Easements¹, being rights which are superadded to the ordinary common law incidents of the ownership of a dominant tenement², and which connote a corresponding burden on a servient tenement² against common right, can only be created by or under statute³ or by grant⁴.

1 For the meaning of 'easement' see PARA 1 ante.

2 For the meaning of 'dominant tenement' and 'servient tenement' see PARA 2 ante.

3 See PARAS 47, 112 et seq post.

4 See PARAS 48, 51 et seq post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(1) IN GENERAL/47. Creation of easement by or under statute.

47. Creation of easement by or under statute.

The chief statutory sources of new easements are:

- 1 (1) the Inclosure Acts, private and general, and awards made by commissioners under them and having the force of statute¹;
- 2 (2) the Railways Clauses Consolidation Act 1845² and awards under it of accommodation works;
- 3 (3) the Access to Neighbouring Land Act 1992³;
- 4 (4) the procedure prescribed by regulations under the Countryside and Rights of Way Act 2000⁴; and
- 5 (5) miscellaneous statutes giving rise to true easements appurtenant to dominant tenements, which are discussed elsewhere in this work⁵.

1 See eg the Inclosure (Consolidation) Act 1801 (repealed) and the Inclosure Act 1845 (now substantially amended). Land held in scattered strips in each of the three open fields of a vill or manor was parcelled out afresh into consolidated or ring fence holdings, ie into modern farms, and the process necessarily involved the creation by the relevant statute or award of numerous fresh easements of way and the extinction of others. See also *Benn v Hardinge* (1992) 66 P & CR 246, CA.

2 Accommodation works for mitigating the severance of a holding by means of bridges, level crossings and arches were required to be made under award by the Railways Clauses Consolidation Act 1845 s 68. See *Midland Rly Co v Gribble* [1895] 2 Ch 129 (affd [1895] 2 Ch 827, CA); *South Eastern Rly Co v Cooper* [1924] 1 Ch 211, CA; *British Railways Board v Glass* [1965] Ch 538, [1964] 3 All ER 418, CA.

3 See PARA 112 et seq post.

4 See PARA 48 the text and notes 3-5 post.

5 See eg the Small Holdings and Allotments Act 1908 s 39(4) (as amended; repealed in relation to smallholdings); and AGRICULTURAL LAND vol 1 (2008) PARA 548; the Opencast Coal Act 1958 s 8 (as amended); and MINES, MINERALS AND QUARRIES; the Leasehold Reform Act 1967 s 10(2); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1453; the Town and Country Planning Act 1990 s 228(3), (4); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 939. A local authority may by a compulsory purchase order purchase compulsorily such new rights over the land as are specified in the order, ie rights which were not in existence when the order specifying them was made: see the Local Government (Miscellaneous Provisions) Act 1976 s 13 (as amended), which now reverses the law as laid down in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, [1977] 2 All ER 385, HL; and LOCAL GOVERNMENT vol 69 (2009) PARA 511. For cases of the creation of easements by statutory enactment see *Adeane v Mortlock* (1839) 5 Bing NC 236; *White v Leeson* (1859) 5 H & N 53; *Lister v Lister* (1839) 3 Y & C Ex 540; *Finch v Great Western Rly Co* (1879) 5 ExD 254 at 261; *Hulbert v Dale* [1909] 2 Ch 570 at 578, CA. See also *Westgate and Birchington Water Co v Powell-Cotton* (1915) 85 LJ Ch 459. As to so-called statutory easements see PARA 43 ante.

UPDATE

47 Creation of easement by or under statute.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(1) IN GENERAL/48. Creation of easement by grant.

48. Creation of easement by grant.

An easement may rest either upon an express grant actually subsisting or upon a presumed grant, or upon a grant arising merely by implication. An easement arising merely by implication is virtually created by express grant, since the creation of the easement is effected by the legal construction of the instrument, even though it contains no express mention of the easement¹.

An easement existing by presumed grant is an easement claimed under the doctrine of prescription, based either upon the doctrine of prescription at common law, or on the doctrine of a lost modern grant, or on the provisions of the Prescription Act 1832, all of which rest upon the fact of long undisturbed enjoyment of the right constituting the easement².

An easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute³. In relation to vehicular access over common land⁴ there are, however, special provisions for the creation of easements giving rights of vehicular access over common land and town or village greens. Such easements can be created only in accordance with regulations, on the application of the owner of the premises concerned, and on compliance by him with prescribed requirements⁵.

1 For the effect of the Law of Property Act 1925 s 62 see PARA 57 post.

2 *Phillips v Halliday* [1891] AC 228 at 231, HL, per Lord Herschell: *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1904] AC 64 at 69, HL, per Lord Halsbury LC. As to the doctrine of prescription see PARA 74 et seq post.

3 *Neaverson v Peterborough RDC* [1902] 1 Ch 557, CA; *George Legge & Son Ltd v Wenlock Corp'n* [1938] AC 204, [1938] 1 All ER 37, HL; *Glamorgan County Council v Carter* [1962] 3 All ER 866, [1963] 1 WLR 1, DC; *Cargill v Gotts* [1981] 1 All ER 682, [1981] 1 WLR 441, CA; *Hanning v Top Deck Travel Group Ltd* (1994) 68 P & CR 14, [1993] 22 LS Gaz R 37, CA (the law as laid down in this case was modified by the Countryside and Rights of Way Act 2000 and regulations made thereunder: see the text and note 5 infra); *Massey v Boulden* [2002] EWCA Civ 1634, [2003] 2 All ER 87, [2003] 1 WLR 1792; *Bakewell Management Ltd v Brandwood* [2003] EWCA Civ 23, [2003] 1 WLR 1429, [2003] 1 P & CR 424.

4 For offences in relation to vehicular access see the Law of Property Act 1925 s 193(4) (as amended); the Road Traffic Act 1988 s 34 (as substituted); and COMMONS vol 13 (2009) PARA 582.

5 See the Countryside and Rights of Way Act 2000 s 68; the Vehicular Access Across Common and Other Land (England) Regulations 2002, SI 2002/1711; and COMMONS vol 13 (2009) PARA 582.

UPDATE

48 Creation of easement by grant

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 3--*Bakewell Management Ltd*, cited, reversed: [2004] UKHL 14, [2004] 2 AC 519, overruling *Hanning*, cited, and *Massey*, cited.

NOTE 5--Countryside and Rights of Way Act 2000 s 68 repealed: Commons Act 2006 s 51, Sch 6 Pt 5. SI 2002/1711 spent.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(1) IN GENERAL/49. Quality of right.

49. Quality of right.

Statutory anomalies apart, whatever be the origin of an easement, the quality of the right when found to be validly subsisting is in every case the same. Whether the right has been created by long enjoyment or by grant, express or implied, makes not the least difference¹. The remedy for the disturbance of the right is also the same².

1 *Leech v Schweder* (1874) 9 Ch App 463; and see also *Dalton v Angus* (1881) 6 App Cas 740 at 809, HL; *Bonomi v Backhouse* (1859) EB & E 646 at 654-655, Ex Ch; on appeal sub nom *Backhouse v Bonomi* (1861) 9 HL Cas 503; *Greenwell v Low Beechburn Coal Co* [1897] 2 QB 165 at 171 (easement of support).

2 *Leech v Schweder* (1874) 9 Ch App 463 at 475 per Mellish LJ.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(1) IN GENERAL/50. Quantum of right.

50. Quantum of right.

There is a most important difference in respect of quantum of right between an easement created by express grant or arising by implication of law and an easement claimed under a presumed grant. In the first two cases the easement may be created for interests analogous in their duration to an estate in fee simple¹, an estate for life², an estate for years³, or even a smaller interest⁴; in the last case the easement must exist, if at all, in perpetuity⁵.

1 See the Law of Property Act 1925 s 1(2)(a); and PARA 5 ante.

2 *Pym v Harrison* (1876) 33 LT 796, CA. Such an easement would be now an equitable easement: Law of Property Act 1925 s 1(3).

3 Ibid s 1(2)(a); *Davis v Morgan* (1825) 4 B & C 8 (right of diverting water from a river for 99 years); *Booth v Alcock* (1873) 8 Ch App 663; *Davies v Marshall* (1861) 1 Drew & Sm 557; *Harding v Wilson* (1823) 2 B & C 96; *Collins v Slade* (1874) 23 WR 199.

4 *Ardley v St Pancras Guardians* (1870) 39 LJ Ch 871. Easements are frequently spoken of as existing for certain estates: see *Wood v Leadbitter* (1845) 13 M & W 838 at 843; *Hewlins v Shippam* (1826) 5 B & C 221.

5 See *Large v Pitt* (1797) Peake Add Cas 152 at 153. As to prescription see *Wheaton v Maple & Co* [1893] 3 Ch 48 at 63, CA; *Kilgour v Gaddes* [1904] 1 KB 457 at 466, CA; and as to lost grant see *Bright v Walker* (1834) 1 Cr M & R 211; *Wheaton v Maple & Co* supra; *East Stonehouse UDC v Willoughby Bros Ltd* [1902] 2 KB 318 at 332; but see *Timmons v Hewitt* (1888) 22 LR Ir 627, CA; *Hanna v Pollock* [1900] 2 IR 664, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/51. Manner of creating legal easements.

(2) CREATION BY EXPRESS GRANT

51. Manner of creating legal easements.

The grant of an easement for a legal estate¹ must be by deed². The use of the word 'grant' is not necessary for the express creation of an easement³; nor is the use of any other particular word⁴. Any words are sufficient which clearly show the intention to create an easement grantable at law⁵.

1 As to the creation of equitable easements see PARAS 5-6, 39 ante, para 52 post.

2 Law of Property Act 1925 s 52(1). By reason of its incorporeal nature an easement has always been treated as lying in grant. See *Co Litt* 9a; *Hewlins v Shippam* (1826) 5 B & C 221 at 229; *Bryan v Whistler* (1828) 8 B & C 288 at 293; *Cocker v Cowper* (1834) 1 Cr M & R 418 at 421; *Wallis v Harrison* (1838) 4 M & W 538; *Adams v Andrews* (1850) 15 QB 284; *Wood v Leadbitter* (1845) 13 M & W 838 at 842; *Liggins v Inge* (1831) 7 Bing 682 at 691; *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437 at 448; *Fentiman v Smith* (1803) 4 East 107 at 109; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 10.

3 Law of Property Act 1925 s 51(2); *Shove v Pincke* (1793) 5 Term Rep 124 at 129 per Lord Kenyon CJ.

4 *Rowbotham v Wilson* (1860) 8 HL Cas 348 at 362.

5 *Rowbotham v Wilson* (1860) 8 HL Cas 348 at 362; *Northam v Hurley* (1853) 1 E & B 665 at 673; *Holms v Seller* (1691) 3 Lev 305. See also *Re Dances Way, West Town, Hayling Island* [1962] Ch 490, [1962] 2 All ER 42, CA, where, it seems, an exception and reservation did not create an easement.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/52. Manner of creating equitable easements.

52. Manner of creating equitable easements.

Where the grant of an easement cannot take effect as the grant of a legal easement by virtue of the Law of Property Act 1925¹ it will take effect as the grant of an equitable easement.

Where under a contract a person becomes the equitable owner of land to which an easement is attached, he becomes at the same time the equitable owner of those easements, subject of course to any contrary terms in the contract².

An equitable easement may be created by an application of the maxim that equity looks on that as done which ought to be done³. An agreement for valuable consideration to grant an easement operates in equity as the grant of an easement; and the grant of an easement by a document which is not a deed is treated in equity as a contract to grant an easement with like effect⁴. The agreement must be made in writing⁵.

A right in the nature of an easement may also arise under the doctrine of proprietary estoppel⁶.

1 See the Law of Property Act 1925 s 1(2)(a); and PARAS 5-6 ante.

2 See *White v Taylor (No 2)* [1969] 1 Ch 160 at 180, [1968] 1 All ER 1015 at 1025 per Buckley J. In *Celsteel Ltd v Alton House Holdings Ltd* [1985] 2 All ER 562, [1985] 1 WLR 204 (revsd in part, but not on this point, [1986] 1 All ER 608, [1986] 1 WLR 512, CA) it was held that the agreement for a lease created an equitable easement.

3 See *Walsh v Lonsdale* (1882) 21 ChD 9, CA; and EQUITY vol 16(2) (Reissue) PARAS 561-562.

4 *Duke of Devonshire v Eglin* (1851) 14 Beav 530; *White v Grand Hotel, Eastbourne* [1913] 1 Ch 113, CA, affd (1915) 84 LJCh 938, HL; *Cory v Davies* [1923] 2 Ch 95; *Thatcher v Douglas* [1996] NPC 206, [1996] NJLR 282, CA; *McManus v Cooke* (1887) 35 ChD 681; *Mason v Clarke* [1955] AC 778, [1955] 1 All ER 914, HL (a profit à prendre). In *Cory v Davies* supra, *McManus v Cooke* supra and *Mason v Clarke* supra reliance was placed on the doctrine of part performance which was abolished by the Law of Property (Miscellaneous Provisions) Act 1989: see s 4, Sch 2.

5 See *ibid* s 2 (as amended); and PARA 127 post; and the Law of Property Act 1925 s 53(1)(a).

6 See PARA 39 ante; and ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/53. The rule against perpetuities.

53. The rule against perpetuities.

The grant of an easement which takes effect not as an immediate right but so as to arise in the future¹ is subject to the rule against perpetuities and will be void unless limited to take effect only within the perpetuity period². The rule of law relating to perpetuities does not, however, apply and is deemed never to have applied to any grant, exception, or reservation of any right of entry on, or user of, the surface of land or of any easements, rights, or privileges over or under land for the purpose of:

- 6 (1) winning, working, inspecting, measuring, converting, manufacturing, carrying away, and disposing of mines and minerals;
- 7 (2) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof;
- 8 (3) executing repairs, alterations, or additions to any adjoining land, or the buildings and erections thereon;
- 9 (4) constructing, laying down, altering, repairing, renewing, cleansing, and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works³.

1 As to whether a grant is of an immediate right or of a right to arise in the future see *Dunn v Blackdown Properties Ltd* [1961] Ch 433, [1961] 2 All ER 62; and see also *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA; *Sharpe v Durrant* [1911] WN 158, CA.

2 *Ardley v St Pancras Guardians* (1870) 39 LJ Ch 871; *Smith v Colbourne* [1914] 2 Ch 533, CA; *Dunn v Blackdown Properties Ltd* [1961] Ch 433 at 438, [1961] 2 All ER 62 at 65 per Cross J; *Newham v Lawson* (1971) 22 P & CR 852.

3 See the Law of Property Act 1925 s 162(1)(d); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1006. As to the effect of s 162(1)(d) see *Dunn v Blackdown Properties Ltd* [1961] Ch 433, [1961] 2 All ER 62; and see further PERPETUITIES AND ACCUMULATIONS.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/54. Extent of grantor's estate.

54. Extent of grantor's estate.

In order to create an easement in fee simple by express grant otherwise than in exercise of some statutory power¹ the grant must be made by the owner of the fee simple of the servient tenement. Similarly, upon the creation of an easement by express grant for any period or interest less than a perpetual interest, it is essential that the grantor be entitled to an interest in the servient tenement greater than or at least co-extensive with the interest for which the easement is created².

A grant of an easement by general words in a conveyance will be construed as being referable only to the interest which the grantor had in the servient tenement at the time of the grant, and will not bind any larger interest which he may afterwards acquire³. If, however, there is any contract or representation that the easement shall be enjoyed for the full term, then if the grantor subsequently acquires a larger interest in the servient tenement the interest so acquired will be bound, for where a person represents himself as having a larger interest in the servient tenement than he has in fact, and purports to create an easement for an interest in excess of what he actually has, then, if he subsequently acquires the larger interest, that interest so acquired is bound by way of estoppel⁴.

The rule that the grantor of an easement must have an estate or interest in the servient tenement as extensive as the period for which the easement is created is subject to exceptions arising from statutory modification of the common law such as the statutory power of a tenant for life to grant a perpetual easement⁵ for all the estate or interest which is vested or declared to be vested in him by the last or only vesting instrument affecting the settled land⁶.

1 As to tenants for life acting under statutory powers see the text and notes 5-6 infra.

2 *Booth v Alcock* (1873) 8 Ch App 663, where it was held that a grant of right to light by a tenant for years did not bind the reversion, and that on the expiration of the lease he (having acquired the reversion himself) might build so as to obstruct the light coming to the former dominant tenement; see also *Re Barrow-in-Furness Corp'n and Rawlinson's Contract* [1903] 1 Ch 339, where it was held that an executrix having a power of sale over the quasi-servient tenement, but no estate or interest in it, could not create an easement over it.

3 *Booth v Alcock* (1873) 8 Ch App 663 at 667 per Mellish LJ; and see *Beddington v Atlee* (1887) 35 ChD 317 at 327; *Axis West Developments Ltd v Chartwell Land Investments Ltd* 1999 SLT 1416, HL (Scots and English law the same on this point). As to the effect of general words in a conveyance see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 233 et seq.

4 *Rowbotham v Wilson* (1857) 8 E & B 123 at 145, Ex Ch, per Watson B ('where a person without title professes to grant an easement his conveyance operates by way of estoppel, if at a subsequent period he acquires the fee'); affd (1860) 8 HL Cas 348; *Booth v Alcock* (1873) 8 Ch App 663; see also ESTOPPEL.

5 Where, however, the object of the tenant for life is not to benefit the settled land but solely to give an advantage to some person at the expense of the remainderman, the transaction may be set aside as being in breach of trust: see eg *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169. Easements over settled land may be exchanged by the tenant for life apart from any exchange or partition of the land: see the Settled Land Act 1925 s 38(iii); and *Re Bracken's Settlement* [1903] 1 Ch 265; and see SETTLEMENTS vol 42 (Reissue) PARA 834.

6 Settled Land Act 1925 s 72(1). See further SETTLEMENTS vol 42 (Reissue) PARA 874. It has not, with very limited exceptions, been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see ss 2, 27; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/55. Extent of grantee's estate.

55. Extent of grantee's estate.

The grantee of an easement must have an estate or interest in the dominant tenement at the time of the grant, and this estate or interest must in general be either greater than or at least co-extensive with the estate or interest for which the easement is created¹. If, however, the grantee receives a grant of an easement in terms which, had he a greater estate in the dominant tenement, would have entitled him to a greater estate in the easement, and afterwards acquires an estate in the dominant tenement as great as or greater than the estate or interest for which the easement was expressly created, the easement may enure to his extended interest in the dominant tenement if it appears that the instrument purporting to create the easement was intended to operate as a covenant as well as a grant².

1 *Smeteborn v Holt* (1347) YB 21 Edw 3 fo 2, pl 5; *Rymer v Mcllroy* [1897] 1 Ch 528; and cf *North British Ry Co v Park Yard Co* [1898] AC 643, HL (Scots law). See *Axis West Developments Ltd v Chartwell Land Investments Ltd* 1999 SLT 1416, HL (Scots and English law the same on this point).

2 *Rymer v Mcllroy* [1897] 1 Ch 528; *Johnstone v Holdway* [1963] 1 QB 601, [1963] 1 All ER 432, CA, applied in *The Shannon Ltd v Venner* [1965] Ch 682, [1965] 1 All ER 590, CA. See also *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/56. How extent and nature of easement ascertained.

56. How extent and nature of easement ascertained.

The nature and extent of an easement created by express grant primarily depend upon the wording of the instrument. In construing a grant of an easement regard must be had to the circumstances existing at the time of its execution¹; for the extent of the easement is ascertainable by the circumstances existing at the time of the grant and known to the parties or within the reasonable contemplation of the parties at the time of the grant², and is limited to those circumstances³. Consequently, if those circumstances are subsequently altered so that there is a radical change in the character or identity of the user or of the dominant tenement, the altered user cannot be justified⁴. However, a mere increase in user is unobjectionable, and thus the dominant owner will not necessarily be limited to the precise circumstances actually in existence at the time of the grant. The distinction is between a mere increase in user and a user of a different kind or for a different purpose, evolution or mutation⁵. Where the terms of the grant are wide enough to permit user for a new and different purpose, the extent of the user must not exceed what was contemplated at the time of the grant, and must not interfere with the rights of others⁶.

1 See *Thornton v Little* (1907) 97 LT 24 (grant of a right of way for visitors to a house used at the time of the grant as a school held to include pupils); *White v Grand Hotel, Eastbourne Ltd* [1913] 1 Ch 113, CA (right of way for general purposes to private dwelling house not affected by the house being turned into a hotel; affd sub nom *Grand Hotel, Eastbourne Ltd v White* [1915] 84 LJ Ch 938, HL); *Kain v Norfolk* [1949] Ch 163, [1949] 1 All ER 176 (an express grant of an easement of way with or without 'horses, carts and agricultural machines and implements' conferred right to cart sand and gravel in motor lorries from beds subsequently opened); *Bulstrode v Lambert* [1953] 2 All ER 728, [1953] 1 WLR 1064 (right to pass and repass over a yard with or without vehicles for purpose of claimant's business, implied right to halt vehicles in yard for purposes of loading and unloading); *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 153, [1955] 3 All ER 667, CA; *Keefe v Amor* [1965] 1 QB 334, [1964] 2 All ER 517, CA; *Jelbert v Davis* [1968] 1 All ER 1182, [1968] 1 WLR 589, CA; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902, [1973] 1 WLR 1572 (affd [1975] 1 All ER 772, [1975] 1 WLR 468, CA); *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993; *Saeed v Plustrade Ltd* [2001] EWCA Civ 2011, [2002] 25 EG 154, [2001] All ER (D) 334 (Dec) (right to park infringed when grantor reduced number of spaces available); *Jalarne Ltd v Ridewood* (1989) 61 P & CR 143; *Mills v Blackwell* [1999] 30 LS Gaz R 30, (1999) 78 P & CR D43, CA; *Martin v Childs* [2002] EWCA Civ 283, [2002] All ER (D) 250 (Feb), [2002] PLSCS 39 (grant of (1) an easement to run water through pipes on servient tenement; and (2) right to enter servient tenement to install, repair, renew etc the conduits; 'installing' held not to include laying new pipe in a different position or of a different dimension).

2 *Todrick v Western National Omnibus Co Ltd* [1934] Ch 190 at 206 (revsd on another point [1934] Ch 561, CA); *Jelbert v Davis* [1968] 1 All ER 1182, [1968] 1 WLR 589, CA; *Hamble Parish Council v Haggard* [1992] 4 All ER 147, [1992] 1 WLR 122.

3 See *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 646, HL; *Stafford v Lee* (1992) 65 P & CR 172, [1992] 45 LS Gaz R 27, CA; and see eg *Martin v Childs* [2002] EWCA Civ 283, [2002] All ER (D) 250 (Feb), [2002] PLSCS 39. For further discussion on easements being limited by the circumstances at the time of grant see *Keewatin Power Co Ltd v Lake of the Woods Milling Co Ltd* [1930] AC 640, PC.

4 *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993.

5 *British Railways Board v Glass* [1965] Ch 538, [1964] 3 All ER 418, CA; *Keefe v Amor* [1965] 1 QB 334, [1964] 2 All ER 517, CA; *Jelbert v Davis* [1968] 1 All ER 1182, [1968] 1 WLR 589, CA; *Woodhouse & Co Ltd v Kirkland (Derby) Ltd* [1970] 2 All ER 587, [1970] 1 WLR 1185; *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P & CR 978; and see also *Henning v Burnet* (1852) 8 Exch 187 (right of way to house and stable altered by owner of dominant tenement so as to be available as means of access to whole of his field); *Bayley v Great Western Rly Co* (1884) 26 ChD 434, CA; *Harris v Flower* (1904) 74 LJ Ch 127, CA; *Ankerson v Connolly* [1907] 1 Ch 678, CA; *South Eastern Rly Co v Cooper* [1924] 1 Ch 211, CA; *McIlraith v Grady* [1968] 1 QB 468, [1967] 3 All ER 625, CA; *Alvis v Harrison* (1991) 62 P & CR 10, 1991 SLT 64, HL (a Scottish appeal which was,

however, said to apply equally to English law); *Das v Linden Mews Ltd* [2002] EWCA Civ 590, [2003] 2 P & CR 58, sub nom *Chand v Linden Mews Ltd* [2002] All ER (D) 09 (May); and see PARAS 159, 179 post. See also *Green v Lord Somerleyton* [2003] EWCA Civ 198, [2003] 10 LS Gaz R 31, [2003] All ER (D) 426 (Feb) (easement of drainage for water emanating from marshes held to include water emanating from lake and passing through those marshes).

6 *Jelbert v Davis* [1968] 1 All ER 1182, [1968] 1 WLR 589, CA (right of way to agricultural land for all purposes exercisable after land converted to caravan site, but not in such a manner as to cause substantial interference with rights of others); *Rosling v Pinnegar* (1986) 54 P & CR 124, [1987] NLJ Rep 77, CA (mere fact that there had been a change of user was not a breach of terms of grant, but use must not interfere unreasonably with the use by other persons of the right of way).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/57. Effect of the Law of Property Act 1925 on conveyances.

57. Effect of the Law of Property Act 1925 on conveyances.

Every conveyance of land is deemed to include and operates to convey, with the land, inter alia all ways, waters, watercourses, liberties, privileges, easements, rights and advantages appertaining or reputed to appertain to the land or, at the time of the conveyance, demised, occupied or enjoyed with or reputed or known as part and parcel or appurtenant to the land or any part of it¹; and a conveyance of land with buildings on it likewise includes, inter alia, all ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land or buildings, or any part of it or them, or, at the time of conveyance, demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land or buildings, or any part of it or them². In every cases there must be no contrary intention expressed in the conveyance³. Rights which arise under these provisions are granted by statutory implication and the conveyance is construed as if the necessary words were expressly contained in it⁴.

'Conveyance' is defined⁵ as including, inter alia, a lease and every other assurance of property, except a will. This does not include an oral lease⁶, nor an agreement for a lease for a term exceeding three years⁷. It does, however, include a tenancy agreement for less than three years, provided it is in writing⁸.

In the absence of contrary intention, a conveyance includes not only easements and other rights which are strictly appurtenant to the property but also the benefit of such de facto or such quasi-easements as would pass under the words 'used and enjoyed therewith or with any part thereof'; that is, easements which formerly existed, but which have been extinguished by unity of possession⁹, if actually used at the date of the lease¹⁰; and also continuous and apparent quasi-easements¹¹ used at that date, even though they have never had an actual existence as legal easements¹². Of this nature is a right of way over a formed road¹³.

A right unknown to the law cannot, however, pass by the operation of these words¹⁴, nor a right which the grantor had at the time no power to grant¹⁵. If the grantor is a tenant for years of the quasi-servient tenement he cannot create a perpetual easement by his grant, but he may bind the quasi-servient tenement for so long as his interest continues¹⁶.

1 Law of Property Act 1925 s 62(1). See *Pollard v Gare* [1901] 1 Ch 834; *Quicke v Chapman* [1903] 1 Ch 659, CA. For cases on the express creation or express conveyance of easements under these statutory provisions see *Lewis v Meredith* [1913] 1 Ch 571; *Re Walmsley and Shaw's Contract* [1917] 1 Ch 93; *Hansford v Jago* [1921] 1 Ch 322; *Long v Gowlett* [1923] 2 Ch 177; *Gregg v Richards* [1926] Ch 521, CA; *Hapgood v JH Martin & Son* (1934) 152 LT 72 (statutory implication excluded at date of severance, but easement of light acquired by subsequent prescription and not precluded by contrary intention in a subsequent conveyance of dominant tenement); *Clark v Barnes* [1929] 2 Ch 368; *Bartlett v Tottenham* [1932] 1 Ch 114; *Burrows v Lang* [1901] 2 Ch 502; *Titchmarsh v Royston Water Co* (1899) 81 LT 673; *Re Peck and London School Board's Contract* [1893] 2 Ch 315; *Re Hughes and Ashley's Contract* [1900] 2 Ch 595, CA; *International Tea Stores Co v Hobbs* [1903] 2 Ch 165; *Wright v Macadam* [1949] 2 KB 744, [1949] 2 All ER 565, CA (use of coal shed an appurtenance within the Law of Property Act 1925 s 62, and passing under a tenancy agreement for less than three years which was a conveyance for the purposes of s 62); *Goldberg v Edwards* [1950] Ch 247, CA; *Godwin v Schweppes Ltd* [1902] 1 Ch 926; *Brazier v Glasspool* [1902] WN 162, CA; *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 at 153, [1955] 3 All ER 667, CA (right to use a park appurtenant to a defined hereditament); *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609 (right to enter servient tenement to maintain wall, not continuous or apparent, but an advantage transformed into an easement by the conveyance); *Graham v Philcox* [1984] QB 747, [1984] 2 All ER 643, CA; *Selby District Council v Samuel Smith Old Brewery (Tadcaster)* (2000) 80 P & CR 466, [2001] 1 EGLR 71, CA; *Hair v Gillman* (2000) 80 P & CR 108, [2000] 3 EGLR 74, CA (permission to park on forecourt of building converted into an easement when land conveyed). As to the words 'or with any part

thereof' see *Koostra v Lucas* (1822) 5 B & Ald 830. A profit à prendre on another's land, such as a right of depasturing sheep on an adjoining mountain, may also be included: *White v Williams* [1922] 1 KB 727, CA.

For similar provisions in the case of a conveyance of a manor see the Law of Property Act 1925 s 62(3). See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236.

2 Law of Property Act 1925 s 62(2). See *Beddington v Atlee* (1887) 35 ChD 317; *Quicke v Chapman* [1903] 1 Ch 659, CA; *Westwood v Heywood* [1921] 2 Ch 130. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236. As to the words 'or with any part thereof' see *Koostra v Lucas* (1822) 5 B & Ald 830.

3 Law of Property Act 1925 s 62(4). An express rebuttal of the presumption in s 62(1) is required, though the express words need not refer to s 62: *Commission for the New Towns v Gallagher Ltd* [2002] EWHC 2668 (Ch), [2003] 2 P & CR 24, [2002] All ER (D) 235 (Dec); *Gregg v Richards* [1926] Ch 521, CA; *Pretoria Warehousing Co Ltd v Shelton* [1993] NPC 98, [1993] EGCS 120, CA (uncertain right granted by lease not a sufficient contrary intention). See *Snell & Prideaux Ltd v Dutton Mirrors Ltd* [1995] 1 EGLR 259, [1994] EGCS 78, CA; *P & S Platt Ltd v Crouch* [2003] EWCA Civ 1110, 147 Sol Jo LB 934, [2003] All ER (D) 440 (Jul) (no contrary intention inferred from option to purchase moorings claimed as an easement).

4 *Broomfield v Williams* [1897] 1 Ch 602 at 610, CA, per Lindley LJ. As to the effect of these words see *Key v Neath RDC* (1905) 93 LT 507; affd (1906) 95 LT 771, CA (free supply of water for domestic purposes); *Hansford v Jago* [1921] 1 Ch 322; *Clark v Barnes* [1929] 2 Ch 368. See also *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634 at 646, HL, per Lord Parker; *Bulstrode v Lambert* [1953] 2 All ER 728 at 733, [1953] 1 WLR 1064 at 1071; *Nickerson v Barraclough* [1981] Ch 426, [1981] 2 All ER 369, CA.

5 Law of Property Act 1925 s 205(1)(ii).

6 *Rye v Rye* [1962] AC 496, [1962] 1 All ER 146, HL.

7 *Borman v Griffith* [1930] 1 Ch 493.

8 See *Wright v Macadam* [1949] 2 KB 744, [1949] 2 All ER 565, CA; *Goldberg v Edwards* [1950] Ch 247, CA; *Green v Ashco Horticulturist Ltd* [1966] 2 All ER 232, [1966] 1 WLR 889; *Graham v Philcox* [1984] QB 747, [1984] 2 All ER 643, CA. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236, where the effect of the Law of Property Act 1925 s 62 on conveyances is discussed.

9 *Barlow v Rhodes* (1833) 1 Cr & M 439 at 448; *Langley v Hammond* (1868) LR 3 Exch 161 at 168 per Kelly CB.

10 See *Roe v Siddons* (1888) 22 QBD 224, CA. The easement will not pass, however, if the particular convenience for which it existed depended upon the continuous occupation of both tenements by the same person: *Kay v Oxley* (1875) LR 10 QB 360 at 366; *Thomson v Waterlow* (1868) LR 6 Eq 36 at 41.

11 See *Pyer v Carter* (1857) 1 H & N 916 at 922; *Watts v Kelson* (1871) 6 Ch App 166 at 173; *Ford v Metropolitan and Metropolitan District Rly Companies* (1886) 17 QBD 12 at 27, CA.

12 *Kay v Oxley* (1875) LR 10 QB 360 at 367; *Barkshire v Grubb* (1881) 18 ChD 616; *Bayley v Great Western Rly Co* (1884) 26 ChD 434 at 454, CA.

13 *Watts v Kelson* (1871) 6 Ch App 166 at 174; *Kay v Oxley* (1875) LR 10 QB 360; *Barkshire v Grubb* (1881) 18 ChD 616; *Baring v Abingdon* [1892] 2 Ch 374 at 390, CA.

14 Ie the words of the Law of Property Act 1925 s 62: see *Burrows v Lang* [1901] 2 Ch 502 at 512 per Farwell J (a right to take from a mill pond such water as its owner, being competent to cut off the supply, might allow to be there is a right unknown to law); *International Tea Stores Co v Hobbs* [1903] 2 Ch 165; *Wright v Macadam* [1949] 2 KB 744, [1949] 2 All ER 565, CA; *Phipps v Pears* [1965] 1 QB 76, [1964] 2 All ER 35, CA; *Green v Ashco Horticulturist Ltd* [1966] 2 All ER 232, [1966] 1 WLR 889; *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, CA (right to have fences maintained can pass under the Law of Property Act 1925 s 62: see PARA 45 ante). See also *Anderson v Bostock* [1976] Ch 312, [1976] 1 All ER 560 (exclusive unlimited right to grazing could not pass under the Law of Property Act 1925 s 62).

15 *Quicke v Chapman* [1903] 1 Ch 659, CA, where the grantor, a builder, had a right to enter upon the neighbouring land for the purpose of building a house, but had no estate or interest in the land and could not therefore grant any easement over it; *MRA Engineering Ltd v Trimster Co Ltd* (1987) 56 P & CR 1, CA; *Re St Clement's, Leigh-on-Sea* [1988] 1 WLR 720, 132 Sol Jo 623, Consist Ct; and see *Financial Times Ltd v Bell* (1903) 19 TLR 433.

16 *Key v Neath RDC* (1905) 93 LT 507; affd (1906) 95 LT 771, CA, where the grantors were tenants from year to year of a reservoir from which a free supply of water had been enjoyed by the land granted.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/58. Diversity of occupation.

58. Diversity of occupation.

The implied grant under the Law of Property Act 1925¹ seems not to arise unless there was diversity of occupation before the conveyance². Where the grantor was the owner and occupier of both tenements one cannot speak in any intelligible sense of rights, privileges or easements being exercised over one part for the benefit of another. The right to light is, however, in a special category and the 1925 Act may apply even though the grantor was before the conveyance the common owner and occupier of both the dominant and servient tenements³.

1 le under the Law of Property Act 1925 s 62: see PARA 57 ante.

2 *Long v Gowlett* [1923] 2 Ch 177, approved, although not as part of the ratio decidendi, in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, [1977] 2 All ER 385, HL; *Payne v Inwood* (1996) 74 P & CR 42, CA; *Squarey v Harris-Smith* (1981) 42 P & CR 118, CA. But see Gale on Easements (17th Edn, 2002) p 157 et seq; Sara *Boundaries and Easements* (3rd Edn, 2002) pp 245-246.

3 *Broomfield v Williams* [1897] 1 Ch 602. Though somewhat anomalous it was accepted as valid in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, [1977] 2 All ER 385, HL. Some take the view that continuous and apparent easements also constitute an exception: see Megarry and Wade *Law of Real Property* (6th Edn, 2000) p 1115, citing *Watts v Kelson* (1871) 6 Ch App 166; *Bayley v Great Western Rly* (1883) 26 ChD 434; *Barkshire v Grubb* (1881) 18 ChD 616.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/59. Reservation and exception of easement.

59. Reservation and exception of easement.

Easements are often spoken of as being reserved or excepted upon the conveyance of land¹. An easement, theoretically, cannot be made the subject matter either of an exception or a reservation, because an easement is neither parcel of the thing granted nor is it something issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation². Prior to 1926 an instrument conveying or otherwise disposing of the servient tenement (and executed by the grantee of the land) which purported to reserve an easement in favour of the owner of the dominant tenement took effect as an easement in favour of the latter by way of a regrant of the right by the grantee of the land³.

1 The difference between a reservation and an exception is that, in the first case, the thing reserved is not something which was in being immediately before the conveyance, but is newly created or reserved out of the land upon the execution of the deed; an exception, on the other hand, is part of the thing conveyed in being before the conveyance, but which is excepted from the operation of the deed. See *Co Litt* 47a; *Shep Touch* 78, 80; *Earl of Cardigan v Armitage* (1823) 2 B & C 197 at 206-207; *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 237-239, and the cases there cited.

2 *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940 at 967, Ex Ch; *Proud v Bates* (1865) 34 LJ Ch 406 at 411; and see *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902 at 917, [1973] 1 WLR 1572 at 1586; *affd* [1975] 1 All ER 772, [1975] 1 WLR 468, CA.

3 *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902 at 917, [1973] 1 WLR 1572 at 1587; *affd* [1975] 1 All ER 772, [1975] 1 WLR 468, CA; *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940, Ex Ch; *London Corpn v Riggs* (1880) 13 ChD 798 at 806 per Jessel MR (regrant of right of way of necessity); *Lord Dynevor v Tennant* (1886) 33 ChD 420, CA (on appeal (1888) 13 App Cas 279, HL); *Midland Rly Co v Miles* (1886) 33 ChD 632 at 644; *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA; *Doe d Douglas v Lock* (1835) 2 Ad & El 705; *Wickham v Hawker* (1840) 7 M & W 63; cf *Batten Pool v Kennedy* [1907] 1 Ch 256 at 265; *Pinnington v Galland* (1853) 9 Exch 1. As to the law after 1925 see PARA 60 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/60. Reservation after 1925.

60. Reservation after 1925.

Since 1926 the reservation of an easement on the conveyance of the servient tenement operates by way of a regrant notwithstanding that the grantee of the servient tenement does not execute the conveyance¹. Notwithstanding this change in the law the reservation will (unlike the case of an exception) still be construed against the grantee and in favour of the grantor of the servient tenement².

¹ For the history of the matter see *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902 at 917, [1973] 1 WLR 1572 at 1586; affd [1975] 1 All ER 772 at 780, [1975] 1 WLR 468 at 478, CA.

² *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 All ER 772, [1975] 1 WLR 468, CA; following *Johnstone v Holdway* [1963] 1 QB 601, [1963] 1 All ER 432, CA; and overruling *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, [1968] 3 All ER 746.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/61. Registered land under the Land Registration Act 1925.

61. Registered land under the Land Registration Act 1925.

The Land Registration Act 1925 has been repealed¹ but it may still be necessary to consider it in relation to transactions that took place before 13 October 2002², and its relevant provisions are considered below.

The proprietor of registered freehold land could, in the prescribed manner, grant or reserve an easement over a legal estate³. Similarly in the case of registered leasehold land the proprietor could, to the extent of his interest, grant or reserve an easement over the land⁴. A lease or underlease for a term not exceeding 21 years at a rent and without fine was an overriding interest, not required to be entered on the register, and took effect as if it were a registered disposition immediately on being granted⁵; but, subject to that, a grant in fee simple or for a term of years of an easement over registered land had to be entered on the register against the registered servient tenement⁶.

An easement subsisting for a legal estate was included in the definition of 'registered land'⁷ but could not be positively entered on the register otherwise than as appurtenant to a registered estate⁸. When so registered it became registered land with a like title⁹, and the benefit enured for an alienee of the registered dominant tenement under a registered disposition subject to any express exception or reservation¹⁰. An equitable interest was held to be a right to be enjoyed with land for the purposes of the Land Registration Rules 1925¹¹ and was consequently an overriding interest within the Land Registration Act 1925¹².

An easement could be acquired by prescription as against registered land, but only in equity unless it could subsist for a legal estate, in which case it took effect at law also and became an overriding interest¹³, and notice of it could be entered on the register if the registrar thought fit. Similarly, if so acquired for the benefit of registered land, it could, if the registrar thought fit, be registered as part of the description of the registered land¹⁴.

1 See the Land Registration Act 2002 s 135, Sch 13.

2 I.e. the date on which the Land Registration Act 2002 came into force: see the Land Registration Act 2002 (Commencement No 4) Order 2003, SI 2003/1725, art 2; and LAND REGISTRATION.

3 Land Registration Act 1925 s 18(1), (2) (repealed).

4 Ibid s 21(1) (repealed).

5 Ibid ss 3(x), 70(1)(k) (repealed).

6 Ibid ss 19(2), 22(2) (repealed).

7 Ibid s 3(xxiv) (repealed); and see *Re Evans' Contract, Evans v Deed* [1970] 1 All ER 1236, [1970] 1 WLR 583 (vendor of registered land could not be compelled to register appurtenant easement over unregistered land under the Land Registration Act 1925 s 110(5) (repealed); and see SALE OF LAND.

8 Ibid s 144(1)(xix), (xx) (repealed); and see the Land Registration Rules 1925, SR & O 1925/1093, rr 3(2)(c), 257, 258 (revoked).

9 Ibid r 254 (revoked).

10 Ibid r 256 (revoked).

11 I.e. for the purposes of the Land Registration Rules 1925, SR & O 1925/1093, r 258 (revoked).

12 *Celsteel Ltd v Alton House Holdings Ltd* [1985] 2 All ER 562, [1985] 1 WLR 204 (revsd in part on another ground [1986] 1 All ER 608, [1986] 1 WLR 512, CA); approved in *Thatcher v Douglas* [1996] NPC 206, [1996] NJLR 282, CA.

13 Land Registration Act 1925 s 75(5) (repealed); Land Registration Rules 1925, SR & O 1925/1093, r 250 (revoked).

14 Ibid rr 250(2)(a), (b) (revoked). See generally LAND REGISTRATION.

UPDATE

61 Registered land under the Land Registration Act 1925

TEXT AND NOTE 2--For '13 October 2002' read '13 October 2003'.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(2) CREATION BY EXPRESS GRANT/62. Registered land under the Land Registration Act 2002.

62. Registered land under the Land Registration Act 2002.

As was the case under the Land Registration Act 1925, an easement cannot be registered by itself under a separate legal title¹. It is provided, however, that the property register of a registered estate must contain, inter alia, details of easements benefiting the registered estate where appropriate². It is further provided that a proprietor of a registered estate who claims the benefit of a legal easement which has been expressly granted over an unregistered legal estate may apply for it to be registered as appurtenant to his estate³. There are corresponding provisions in relation to implied or prescriptive appurtenant rights⁴.

In relation to the dominant tenement, on the first registration of a person as proprietor of a freehold estate with absolute title the estate is vested in him together with all interests subsisting for the benefit of the estate⁵ and there are corresponding provisions where he is registered as proprietor of a leasehold estate with absolute title⁶.

In relation to the servient tenement, on the first registration of a person as proprietor of a freehold estate with absolute title the estate is vested in him subject to, inter alia, (1) interests which are the subject of an entry in the register in relation to the estate; and (2) legal easements⁷. There are corresponding provisions where he is registered as proprietor of a leasehold estate with absolute title⁸.

A person who claims to be entitled to an easement affecting an unregistered legal estate may lodge a caution against first registration and will then be given notice of any application for first registration and have the opportunity of objecting to it⁹.

The express grant¹⁰ or reservation of an easement¹¹ should be completed by registration¹² and does not operate at law until the relevant registration requirements have been met¹³.

The effect of the completion of a registrable disposition of a registered estate for valuable consideration is to postpone to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration¹⁴. The priority of an easement is protected if (a) it is the subject of a notice in the register¹⁵; or (b) it is a legal easement which falls within the list contained in Schedule 3 to the Act of unregistered interests which override registered dispositions¹⁶. Unlike the position on first registration, however, the protection has a much more limited scope. Any person who acquires an interest for valuable consideration under a registered disposition will only be bound by an easement that is an interest overriding such a disposition if:

- 10 (i) it is registered under the Commons Registration Act 1965;
- 11 (ii) he or she actually knows of it;
- 12 (iii) it is patent, that is to say, it is obvious on a reasonably careful inspection of the land over which the easement is exercisable, so that no seller of land would be obliged to disclose it; or
- 13 (iv) it has been exercised within the period of one year before the disposition¹⁷.
- 14 There are transitional provisions relating to former overriding interests¹⁸.

1 See the Land Registration Act 2002 s 3(1). A profit à prendre in gross may, however, be registered: s 3(1) (d). The Land Registration Act 2002 and the Land Registration Rules 2003, SI 2003/1417, came into force on 13 October 2003: see SI 2003/935, SI 2002/1028, SI 2003/1612, SI 2003/1725; and see generally LAND REGISTRATION.

2 Land Registration Rules 2003, SI 2003/1417, r 5(b)(ii).

3 Ibid r 73(1). For this purpose, the reference to express grant does not include grant as a result of the operation of the Law of Property Act 1925 s 62 (general words implied in conveyances: see PARA 57 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236): Land Registration Rules 2003, SI 2003/1417, r 73(3). The application must be accompanied by the grant and evidence of the grantor's title to the unregistered estate: r 73(2).

4 See ibid r 74(1), which includes acquisition as a result of the operation of the Law of Property Act 1925 s 62 (Land Registration Rules 2003, SI 2003/1417, r 74(3)). The application must be accompanied by evidence to satisfy the registrar that the right subsists as a legal estate appurtenant to the applicant's registered estate: r 74(2).

5 See the Land Registration Act 2002 s 11(1)-(3), (5); the Land Registration Rules 2003, SI 2003/1417, r 33. There are modifications in the case of registration with qualified title (see the Land Registration Act 2002 s 11(6)) and in the case of registration with possessory title (see s 11(7)).

6 See the Land Registration Act 2002 s 12(1)-(3), (5); the Land Registration Rules 2003, SI 2003/1417, r 33. There are modifications in the case of registration with good leasehold title (see the Land Registration Act 2002 s 12(6)), or with qualified title (see s 12(7)) or with possessory title (see s 12(8)).

7 Land Registration Act 2002 s 11(1), (2), (4)(a), (b), (5), Sch 1 para 3; Land Registration Rules 2003, SI 2003/1417, r 35. There are modifications in the case of registration with qualified title (see the Land Registration Act 2002 s 11(6)) and in the case of registration with possessory title (see s 11(7)). As to rights of light and air see the Land Registration Rules 2003, SI 2003/1417, r 36.

8 Land Registration Act 2002 s 12(1), (2), (4)(b), (c), (5), Sch 1 para 3; Land Registration Rules 2003, SI 2003/1417, r 35. There are modifications in the case of registration with good leasehold title (see the Land Registration Act 2002 s 12(6)), or with qualified title (see s 12(7)) or with possessory title (see s 12(8)). As to rights of light and air see the Land Registration Rules 2003, SI 2003/1417, r 36.

9 See the Land Registration Act 2002 ss 15, 16; and LAND REGISTRATION.

10 For this purpose, the reference to express grant does not include grant as a result of the operation of the Law of Property Act 1925 s 62 (general words implied in conveyances: see PARA 57 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236): Land Registration Act 2002 s 27(7).

11 Ie other than one which is capable of being registered under the Commons Registration Act 1965: Land Registration Act 2002 s 27(2)(d).

12 The registration requirements are set out in ibid s 27(4), Sch 2 para 7.

13 Ibid s 27(1), (2).

14 Ibid s 29(1).

15 Ibid s 29(2)(a)(i).

16 Ibid s 29(2)(a)(ii).

17 See ibid Sch 3 para 3.

18 See ibid s 124, Sch 12 paras 9, 10. Under Sch 12 para 9 where an easement was an overriding interest under the Land Registration Act 1925 immediately before 13 October 2003 but would not be under the provisions of the Land Registration Act 2002 Sch 3 para 3, its priority is protected without the need for registration. Under Sch 3 para 10 for three years after 13 October 2003 any legal easement that is not registered will have protected priority. See further LAND REGISTRATION.

UPDATE

62 Registered land under the Land Registration Act 2002

TEXT AND NOTE 2--SI 2003/1417 r 5(b)(ii) substituted: SI 2008/1919.

TEXT AND NOTES 3, 4--SI 2003/1417 r 73A substituted for rr 73, 74: SI 2008/1919.

TEXT AND NOTES 5, 6--SI 2003/1417 r 33 amended: SI 2008/1919.

NOTE 11--For 'Commons Registration Act 1965' read 'Commons Act 2006 Part 1 (ss 1-25)': 2002 Act s 27(2)(d) (amended by the Commons Act 2006 Sch 5 para 8(2) (not yet in force)).

TEXT AND NOTE 17--In TEXT head (i) for 'Commons Registration Act 1965' read 'Commons Act 2006 Part 1 (ss 1-25)': 2002 Act Sch 3 para 3 (amended by the Commons Act 2006 Sch 5 para 8(4) (not yet in force)).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/63. Implied grant or reservation of easement.

(3) CREATION BY IMPLICATION OF LAW

63. Implied grant or reservation of easement.

The doctrine of the creation of easements by implication of law¹ is founded upon an implied grant² which arises in connection with some express grant or disposition of the servient or dominant tenement³. Such a grant can only be implied where both the dominant and servient tenements have been in common ownership so that the creation of an easement by implication of law may be said to be the outcome of the former relationship between the two tenements. The disposition which causes a cessation of the common ownership and thus gives rise to the implication of an easement may be of either tenement⁴, or a simultaneous disposition of both tenements⁵. The disposition may be a grant in fee simple⁶ or a grant for life⁷ and the fact that the servient tenement⁸ or dominant tenement⁹ is in lease at the date of the disposition does not seem to defeat the implication.

The principle stated above applies to leases as well as to other grants made upon the severance of two tenements, one being retained by the grantor¹⁰.

The doctrine under which easements are held to be created by implication of law holds good with regard to devises and dispositions by will as well as to dispositions inter vivos¹¹. The right claimed must, of course, be capable of constituting the subject matter of an easement¹².

1 *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 323, note (6); *Wheeldon v Burrows* (1879) 12 ChD 31, CA; *Polden v Bastard* (1865) LR 1 QB 156, Ex Ch; *Leech v Schweder* (1874) 9 Ch App 463; *Watts v Kelson* (1871) 6 Ch App 166; *Thomas v Owen* (1887) 20 QBD 225, CA; *Master v Hansard* (1876) 4 ChD 718 at 721, CA; *Richards v Rose* (1853) 9 Exch 218; *Shubbrook v Tufnell* (1882) 46 LT 886; *Westwood v Heywood* [1921] 2 Ch 130 (water pipe right). Cf also *Pyer v Carter* (1857) 1 H & N 916 (the decision in which case was approved in *Morland v Cook* (1868) LR 6 Eq 252; *Watts v Kelson* supra, and *Pearson v Spencer* (1863) 3 B & S 761, Ex Ch, but was dissented from in *Suffield v Brown* (1864) 4 De GJ & Sm 185 and not followed in *Wheeldon v Burrows* supra, in so far as the doctrine of implied reservation was concerned). As to the creation by implication of law of ways of necessity see PARA 164 et seq post.

2 *Phillips v Low* [1892] 1 Ch 47 at 50.

3 *Phillips v Low* [1892] 1 Ch 47 at 50; *Timmons v Hewitt* (1888) 22 LR Ir 627, CA; and see *White v Taylor* (No 2) [1969] 1 Ch 160, [1968] 1 All ER 1015.

4 As to dispositions of the dominant tenement see *Howton v Frearson* (1798) 8 Term Rep 50; *Oldfield's Case* (1608) Noy 123; *Palmer v Fletcher* (1663) 1 Lev 122. As to dispositions of the servient tenement see *Pinnington v Galland* (1853) 9 Exch 1; *Pyer v Carter* (1857) 1 H & N 916 (as to this case see note 1 supra); cf *Beddington v Atlee* (1887) 35 ChD 317.

5 See eg *Swansborough v Coventry* (1832) 9 Bing 305; see also *Barnes v Loach* (1879) 4 QBD 494, DC; *Rigby v Bennett* (1882) 21 ChD 559 at 567, CA, per Jessel MR; *Allen v Taylor* (1880) 16 ChD 355; *Phillips v Low* [1892] 1 Ch 47 at 51 per Chitty J; *Pinnington v Galland* (1853) 9 Exch 1; *Richards v Rose* (1853) 9 Exch 218; *Schwann v Cotton* [1916] 2 Ch 459, CA (devise of both tenements); *Hansford v Jago* [1921] 1 Ch 322 (right of way). Cf also *Russell v Harford* (1866) LR 2 Eq 507.

6 *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 323, note (6).

7 *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321.

8 *Coutts v Gorham* (1829) Mood & M 396; *Cable v Bryant* [1908] 1 Ch 259; *Westwood v Heywood* [1921] 2 Ch 130.

9 *Barnes v Loach*(1879) 4 QBD 494, DC.

10 See *Warner v McBryde* (1877) 36 LT 360; *Birmingham, Dudley and District Banking Co v Ross*(1888) 38 ChD 295, CA; *Pollard v Gare*[1901] 1 Ch 834. The implied grant of an easement is limited to the actual continuance of the lease: *Beddington v Atlee*(1887) 35 ChD 317 at 323. It may include the right to access of light and air over the adjoining property (see *Frederick Betts Ltd v Pickfords Ltd*[1906] 2 Ch 87); but the light must be enjoyed through particular windows, and the air through a definite aperture in the nature of a window in the demised property, or through a definite channel over adjoining property (*Aldin v Latimer Clark, Muirhead & Co*[1894] 2 Ch 437 at 446). The right of the lessee, however, may be more extensive if required for particular purposes for which the premises are let: *Aldin v Latimer Clark, Muirhead & Co* supra; *Wong v Beaumont Property Trust Ltd*[1965] 1 QB 173, [1964] 2 All ER 119, CA; and see PARA 69 post. On the other hand, it is excluded if the circumstances at the time of the granting of the lease show that it was not intended that he should have it: *Birmingham, Dudley and District Banking Co v Ross* supra; see *Broomfield v Williams*[1897] 1 Ch 602, CA. As to an implied right of support see *Rigby v Bennett*(1882) 21 ChD 559, CA.

11 *Barnes v Loach*(1879) 4 QBD 494, DC; *Pheysey v Vicary* (1847) 16 M & W 484; *Allen v Taylor*(1880) 16 ChD 355 (light); *Phillips v Low*[1892] 1 Ch 47 (light); *Milner's Safe Co Ltd v Great Northern and City Rly Co*[1907] 1 Ch 208 (right of way); *Pearson v Spencer* (1861) 1 B & S 571; affd (1863) 3 B & S 761, Ex Ch; *Schwann v Cotton*[1916] 2 Ch 459, CA (right to water through pipe); see also *Nicholls v Nicholls* (1899) 81 LT 811 (right of way). Cf *Whalley v Thompson* (1799) 1 Bos & P 371; *Taws v Knowles*[1891] 2 QB 564, CA.

12 *Wheeldon v Burrows*(1879) 12 ChD 31, CA; *Union Lighterage Co v London Graving Dock Co*[1902] 2 Ch 557, CA; *Richards v Rose*(1853) 9 Exch 218 at 221 per Pollock CB.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/64. Implied reservation.

64. Implied reservation.

Where the owner of two tenements¹ sells and conveys one for an absolute estate in it, he puts an end by contract to the relation which he had himself created between the land sold and the land retained, and discharges the land so sold from any burden imposed upon it during his joint occupation. The condition of that land is thenceforth determined by the contract of alienation and not by the previous user of the former common owner during his common ownership². Where the common owner disposes of the quasi-servient tenement the effect of the principles that a person shall not derogate from his grant³ and that a grant is always to be construed most strictly against the grantor⁴ is that normally no easement will be implied in favour of the grantor who retains the quasi-dominant tenement. If a grantor wishes to reserve⁵ an easement in favour of the land he retains, it is his duty to reserve it expressly in the grant⁶. It is not enough that at the date of the grant the state of affairs is merely consistent with a common intention that there should be a reservation in favour of the grantor. If the grantor fails to make a clear and express reservation he will not have an easement unless it is an easement of necessity⁷ or an intended easement⁸.

1 The same principle applies to one tenement divided into two parts.

2 *Suffield v Brown* (1864) 4 De GJ & Sm 185, per Lord Westbury LC; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478; *Wheeldon v Burrows* (1879) 12 ChD 31, CA; *White v Taylor (No 2)* [1969] 1 Ch 160 at 179, [1968] 1 All ER 1015 at 1024-1025.

3 For a discussion of this principle see PARA 38 ante; the cases cited in note 6 infra; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 58. See also *Cable v Bryant* [1908] 1 Ch 259 (principle is a rule of law and not a rule of equity).

4 *Willion v Berkley* (1561) 1 Plowd 223 at 243 per Weston J; *Neill v Duke of Devonshire* (1882) 8 App Cas 135 at 149, HL, per Lord Selborne LC; *Johnson v Edgware etc Rly Co* (1866) 35 Beav 480 at 484 per Lord Romilly MR. It has been said that the reason for this rule of construction is that, were it otherwise, grantors would always affect ambiguous expressions if they were afterwards at liberty to put their own construction on them: Cru Dig, Deed, 32, c 20, s 13; Shep Touch 87. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 178-179.

5 Strictly speaking 'reservation' is an inaccurate expression: see PARAS 59-60 ante.

6 *Wheeldon v Burrows* (1879) 12 ChD 31 at 49, CA, per Thesiger LJ; *Taws v Knowles* [1891] 2 QB 564 at 568, CA; *Gordon v Ogilvie* (1899) 15 TLR 239; *Millman v Ellis* (1995) 71 P & CR 158, CA; *Chaffe v Kingsley* (1999) 79 P & CR 404, [2000] 1 EGLR 104, CA. See also *Ray v Hazeldine* [1904] 2 Ch 17 at 19 per Kekewich J; *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 566-567, CA, per Vaughan Williams LJ; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478 at 486 per Lord Chelmsford LC; *Cory v Davies* [1923] 2 Ch 95 at 109 per Lawrence J; *Aldridge v Wright* [1929] 2 KB 117, CA; *Simpson v Weber* (1925) 133 LT 46 (implied reservation of easement for creeper and gate post; criticised in *Liddiard v Waldron* [1934] 1 KB 435, CA); *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA (general words not sufficient to retain fee simple in, or easement in respect of, a cellar under grantee's property for grantor). In *Pitt v Buxton* (1970) 21 P & CR 127 it was said that it may be possible to constitute an express regrant of an easement over land conveyed in favour of land retained by the use of general words referring to current de facto accommodation of the latter by the former, and this was applied in *Pallister v Clark* (1975) 30 P & CR 84, CA.

7 See PARA 65 post.

8 See PARA 67 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/65. Easements of necessity; implied reservation.

65. Easements of necessity; implied reservation.

Where the common owner grants land which contains the only access to the land he retains, the law implies a way of necessity. It must be shown that the facts are consistent with no other explanation short of the necessity of the case¹. The rule of implied reservation is founded upon the impossibility of admitting that the contract, according to the true intention of the parties, would be complete without this implication². The extent of the easement thus created by necessity is also limited to the bare necessities of the case: thus where there are several ways to a land-locked tenement the owner of the servient tenement can select the way which the land-locked owner shall use, provided the way selected is reasonably convenient³. It has been held that if the necessity ceases the easement of necessity comes to an end⁴, but this decision has been criticised⁵.

1 *Re Webb's Lease, Sandom v Webb* [1951] Ch 808, [1951] 2 All ER 131, CA (distinguishing and criticising *Simpson v Weber* (1925) 133 LT 46; and see *Liddiard v Waldron* [1934] 1 KB 435, CA, in which *Thomas v Owen* (1887) 20 QBD 225, CA, was distinguished and held on its special facts to have laid down no new principle by way of exception from the general rule in *Wheeldon v Burrows* (1879) 12 ChD 31, CA. The approach in *Re Webb's Lease, Sandom v Webb* supra was held to remain the law in *Peckham v Ellison* (1998) 79 P & CR 276, 31 HLR 1030, CA (though on the special facts of that case it was held that a right of way was impliedly reserved in favour of the vendor) and was applied in *Chaffe v Kingsley* [2000] 1 EGLR 104, CA and *Holaw (470) Ltd v Stockton Estates Ltd* (2000) 81 P & CR 404, [2000] All ER (D) 943).

2 *Wheeldon v Burrows* (1879) 12 ChD 31 at 44, CA.

3 *Bolton v Bolton* (1879) 11 ChD 968; *Holmes v Goring* (1824) 2 Bing 76. See PARA 167 post.

4 *Holmes v Goring* (1842) 2 Bing 76.

5 *Proctor v Hodgson* (1855) 10 Exch 824; *Barkshire v Grubb* (1881) 18 ChD 616 at 620 per Fry J.

UPDATE

65 Easements of necessity; implied reservation

NOTE 2--A claim for a right of way under the rule in *Wheeldon v Burrows* may fail where the terminus at the ends of a right of way cannot be established: *Donaldson v Smith* [2007] WTLR 421.

NOTE 4--Entitlement to an easement of necessity may cease where an alternative access route has been created: *Donaldson v Smith* [2007] WTLR 421.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/66. Instances of easements of necessity.

66. Instances of easements of necessity.

The easement of support is not in every case an easement of necessity¹, nor is the easement of light, although it may be essential to the comfortable enjoyment of a particular room². A right of way of necessity is of more common occurrence, for where an owner grants part of his tenement and the circumstances are such that the part granted or the part retained³ is land-locked, that is, cannot be approached without committing a trespass except by means of a way of some sort over other land originally belonging to the grantor, a way of necessity is created upon the severance⁴. The right to install a ventilation duct and use it has been held to be an easement of necessity⁵ but it should perhaps be more properly classified as an intended easement⁶.

1 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557, CA; and cf *Peyton v London Corpn* (1829) 9 B & C 725. See *Richards v Rose* (1853) 9 Exch 218; and *Shubrook v Tufnell* (1882) 46 LT 886, where an easement of support for a house was held to be an easement of necessity.

2 *Ray v Hazeldine* [1904] 2 Ch 17, where access of light to a room used as a pantry, without which the room could not be used for that purpose, was held not to be an easement of necessity.

3 *Clark v Cogge* (1607) Cro Jac 170; *Pinnington v Galland* (1853) 9 Exch 1 at 12; *Wheeldon v Burrows* (1879) 12 ChD 31, CA.

4 *Pearson v Spencer* (1861) 1 B & S 571 at 584; affd (1863) 3 B & S 761; *Clark v Cogge* (1607) Cro Jac 170; and see *Barry v Hasseldine* [1952] Ch 835, [1952] 2 All ER 317. An easement of necessity will not be implied where access can be obtained on foot but not by car: *MRA Engineering Ltd v Trimster Co Ltd* (1987) 56 P & CR 1, CA. As to ways of necessity see PARA 165 post.

5 *Wong v Beaumont Property Trust Ltd* [1965] 1 QB 173, [1964] 2 All ER 119, CA. See also *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39, HL; *Nickerson v Barraclough* [1981] Ch 426, [1981] 2 All ER 369, CA.

6 See (1964) 80 LQR 322n (REM).

UPDATE

66 Instances of easements of necessity

NOTE 4--See *Sweet v Sommer* [2005] EWCA Civ 227, [2005] All ER (D) 162 (Mar).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/67. Intended easements; implied reservation.

67. Intended easements; implied reservation.

An easement may also be implied in favour of the grantor who disposes of the quasi-servient tenement where this is required to carry out the common intention of the parties. Thus if one of two houses supported by each other is conveyed by the common owner mutual easements of support may be implied¹. Such intended easements require the claimant to establish a common intention as to some definite and particular user. He must also show that the easements he claims are necessary to give effect to it². A heavy burden of proof lies on the grantor³.

1 *Richards v Rose* (1853) 9 Exch 218. Cf *Shubrook v Tufnell* (1882) 46 LT 886, treating the rights as easements of necessity. See also *Jones v Pritchard* [1908] 1 Ch 630; *Cory v Davies* [1923] 2 Ch 95; *Simpson v Weber* (1925) 133 LT 46; and contrast *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, HL; *Re Webb's Lease, Sandom v Webb* [1951] Ch 808, [1951] 2 All ER 131, CA.

2 *Stafford v Lee* (1992) 65 P & CR 172, [1992] EGCS 136, CA.

3 *Re Webb's Lease, Sandom v Webb* [1951] Ch 808, [1951] 2 All ER 131, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/68. Implied grant; in general.

68. Implied grant; in general.

Where the common owner disposes of the quasi-dominant tenement the principles of construction that a person shall not derogate from his grant¹ and that a grant be construed in favour of the grantee² militate in favour of the grantee. The grantee, like the grantor, may be able to claim an easement on the basis of (1) an easement of necessity; or (2) an intended easement. However, where he does so an application of the principles of construction makes it easier for him to make out his case than a grantor who claims an implied reservation. A grantee may also claim under the rule in *Wheeldon v Burrows*³.

1 For a discussion of this principle see PARA 38 ante; the cases cited at para 64 note 6 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 58. See also *Cable v Bryant* [1908] 1 Ch 259 (principle is a rule of law and not a rule of equity).

2 *Willion v Berkley* (1561) 1 Plowd 223 at 243 per Weston J; *Neill v Duke of Devonshire* (1882) 8 App Cas 135 at 149, HL, per Lord Selborne LC; *Johnson v Edgware etc Rly Co* (1866) 35 Beav 480 at 484 per Lord Romilly MR. It has been said that the reason for this rule of construction is that, were it otherwise, grantors would always affect ambiguous expressions if they were afterwards at liberty to put their own construction on them: Cru Dig, Deed, 32, c 20, s 13; Shep Touch 87. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 178-179.

3 I.e. the rule in *Wheeldon v Burrows* (1879) 12 ChD 31, CA: see PARA 71 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/69. Easement of necessity; implied grant.

69. Easement of necessity; implied grant.

In relation to an easement of necessity the implication of law which raises the easement is founded upon the principle that a person must do all he can to make his grant effective, and if his grant would to all purposes be ineffectual, except on the footing of his retained property affording the easement necessary to give the grantee the enjoyment of the land granted, the grantor is held bound to submit to this easement¹.

¹ *Pinnington v Galland* (1853) 9 Exch 1 (right of way); *Richards v Rose* (1853) 9 Exch 218 (easement of support); *Bayley v Great Western Rly Co* (1884) 26 ChD 434 at 453, CA, per Bowen LJ; *Wong v Beaumont Property Trust Ltd* [1965] 1 QB 173, [1964] 2 All ER 119, CA (lease of cellar for restaurant; easement of necessity to install ventilation duct required by statute). Cf *Titchmarsh v Royston Water Co Ltd* (1899) 81 LT 673. As to ways of necessity see generally para 165 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/70. Intended easements; implied grant.

70. Intended easements; implied grant.

An easement will readily be implied in favour of the grantee where this is required to carry out the common intention of the parties. The rule against derogation from grant¹ may also apply where there has been no previous enjoyment of the alleged easement in question, if from the contract between the parties it must be assumed that the grantee was intended to use the land granted in a manner for which that easement would be reasonably necessary².

¹ See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 58; and see PARAS 38, 64 the text and note 3 ante.

² *Frederick Betts Ltd v Pickfords Ltd* [1906] 2 Ch 87 at 93 per Kekewich J (covenant by lessees to erect buildings according to plans containing windows implies a right to light and air necessary to those windows); *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609; and cf *Brazier v Glasspool* [1902] WN 162, CA. See also *Rudd v Bowles* [1912] 2 Ch 60; *Browne v Flower* [1911] 1 Ch 219 at 225 per Parker J.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/71. The rule in *Wheeldon v Burrows*.

71. The rule in *Wheeldon v Burrows*.

Where the common owner disposes of the quasi-dominant tenement as it is then used and enjoyed the rule in *Wheeldon v Burrows*¹ is that there will pass to the grantee all those continuous and apparent easements (that is to say quasi-easements), or, in other words all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. It is not clear whether the requirement that the easement should be continuous and apparent is an alternative to the requirement that the easement be necessary for the reasonable enjoyment of the property granted or whether the requirements are synonymous². It is plain that the test of what is necessary for the reasonable enjoyment of land is not the same as the test for a way of necessity³.

Where there are simultaneous dispositions of the quasi-dominant and quasi-servient tenements by the common owner each grantee will obtain the same rights against the other grantee as if the other land had been retained by the common owner⁴. The implication of a right to enjoy the easement claimed must not be inconsistent with the words of express grant, nor must the operation of the rule in *Wheeldon v Burrows* be otherwise excluded by the language of the grant⁵.

In many cases the statutory provisions⁶ will make it unnecessary to rely on the rule in *Wheeldon v Burrows* but if for any reason those provisions do not apply the rule may be brought into play⁷.

1 *Wheeldon v Burrows* (1879) 12 ChD 31, CA. The statement in the text is taken from the judgment of Thesiger LJ which has been constantly cited in subsequent cases as representing the law; see eg *Wheeler v JJ Saunders Ltd* [1996] Ch 19 at 31, [1995] 2 All ER 697 at 707, CA, per Peter Gibson LJ ('Thesiger LJ's proposition has been accepted as correctly stating the law and cannot now be doubted'); and see *Polden v Bastard* (1865) LR 1 QB 156, Ex Ch (non-continuous easement); *Allen v Taylor* (1880) 16 ChD 355; *Phillips v Low* [1892] 1 Ch 47; *Pearson v Spencer* (1863) 3 B & S 761, Ex Ch; *Brown v Alabaster* (1887) 37 ChD 490; *Thomas v Owen* (1887) 20 QBD 225, CA; *Nicholls v Nicholls* (1899) 81 LT 811; *Canham v Fisk* (1831) 2 Cr & J 126; *Ewart v Cochrane* (1861) 7 Jur NS 925, HL; *Westwood v Heywood* [1921] 2 Ch 130; *Aldridge v Wright* [1929] 2 KB 117, CA (assignment of lease of quasi-servient tenement). See also *Liddiard v Waldron* [1934] 1 KB 435, CA, for a review of judicial decisions on the subject of implied reservations; and see PARA 64 et seq ante.

2 Said to be 'tolerably clear' that they are synonymous in *Wheeler v JJ Saunders Ltd* [1996] Ch 19 at 31, [1995] 2 All ER 697 at 707, CA, per Peter Gibson LJ. See *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609; *Squarey v Harris-Smith* (1981) 42 P & CR 118.

3 *Wheeler v JJ Saunders Ltd* [1996] Ch 19 at 31, [1995] 2 All ER 697 at 707, CA, per Peter Gibson LJ, who on the facts dissented from the majority decision that the way was not necessary for the reasonable enjoyment of the property.

4 *Nicholls v Nicholls* (1899) 81 LT 811; *Allen v Taylor* (1880) 16 ChD 355; *Milner's Safe Co Ltd v Great Northern and City Rly Co* [1907] 1 Ch 208; *Barnes v Loach* (1879) 4 QBD 494, DC; *Swansborough v Coventry* (1832) 9 Bing 305; *Phillips v Low* [1892] 1 Ch 47; *Schwann v Cotton* [1916] 2 Ch 459, CA; *Hansford v Jago* [1921] 1 Ch 322. Cf *Compton v Richards* (1814) 1 Price 27; *Selby District Council v Samuel Smith Old Brewery (Tadcaster)* (2000) 80 P & CR 466, [2001] 1 EGLR 71, CA.

5 *Millman v Ellis* (1995) 71 P & CR 158, CA.

6 *Ie* the Law of Property Act 1925 s 62: see PARA 57 ante.

7 See PARA 57 ante. Thus in *Borman v Griffith* [1930] 1 Ch 493 the agreement for a lease fell outside the Law of Property Act 1925 s 62, but the rule in *Wheeldon v Burrows* (1879) 12 ChD 31, CA applied to give the lessee a right of way as being necessary to the reasonable enjoyment of the property.

UPDATE

71 The rule in *Wheeldon v Burrows*

NOTE 7--The rule in *Wheeldon v Burrows* has no application to a conveyance executed to give effect to the obligation imposed by the Leasehold Reform Act 1967 s 8(1) (see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1439): *Kent v Kavanagh* [2006] EWCA Civ 162, [2007] Ch 1.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/72. Continuous and apparent.

72. Continuous and apparent.

Strictly a continuous easement is one, such as the right to light, which is enjoyed passively, which may be contrasted with a right such as a right of way which is only enjoyed from time to time¹. Where, however, the easement is apparent, the need for it to be continuous is relaxed. Apparent easements mean not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject². A house upon the part of the tenement granted having windows overlooking the part retained constitutes a quasi-easement in respect of light, and this quasi-easement is such that it may be regarded as an apparent and continuous easement which may ripen into a true easement in favour of the grantee³ as against the grantor and all persons acquiring the retained land from him⁴ after the date of the grant of the house containing the windows unless the grantor had agreed to sell the retained land before the house was granted⁵.

Where there are no apparent signs of the existence of the easement afforded by one part of a tenement to the other, no easement is created. Thus a right of egress and regress to the part granted cannot be claimed in favour of the grantee where there is no path or visible sign of such a right having been used⁶. If, however, there is a made and visible road which has been used for the purpose of the part granted, a right of way will be created over that road⁷. The implication of such a right is strengthened by the appearance in the conveyance of such words as 'with all rights usually enjoyed therewith' or 'with all rights appertaining thereto', but probably the mere grant of the land itself without general words would carry the right of way⁸. The road must be a defined one made up and running in a definite direction⁹. It is not sufficient that the retained portion affords a way which has in fact been used for egress and regress to and from the portion granted, for when a person walks over his own land in a particular direction he does no more than merely proceed where he pleases on his own property¹⁰.

1 See PARA 28 ante.

2 *Pyer v Carter* (1857) 1 H & N 916 at 922: see PARA 63 note 1 ante. See also *Glave v Harding* (1858) 27 LJ Ex 286. 'Apparent' also includes an accommodation apparent on the premises granted: *Schwann v Cotton* [1916] 2 Ch 120 at 141 per Astbury J; on appeal [1916] 2 Ch 459, CA.

3 *Rosewell v Prior* (1701) 6 Mod Rep 116; *Swansborough v Coventry* (1832) 9 Bing 305.

4 *Davies v Marshall* (1861) 1 Drew & Sm 557 (a lessee from the grantor is in no better position than the grantor himself).

5 *Beddington v Atlee* (1887) 35 ChD 317.

6 *Titchmarsh v Royston Water Co Ltd* (1899) 81 LT 673; *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609 (right to enter servient tenement to maintain a wall not continuous or apparent but transformed into an easement by the Law of Property Act 1925 s 62 (as to which see PARA 57 ante)).

7 *Bayley v Great Western Rly Co* (1883) 26 ChD 434 at 441-442, CA, per Chitty J, and at 452-453 per Bowen LJ. See also *Re Walmsley and Shaw's Contract* (1917) 86 LJ Ch 120 (cart track over vendor's retained land); *Hamsford v Jago* [1921] 1 Ch 322.

8 *Bayley v Great Western Rly Co* (1883) 26 ChD 434 at 457, CA, per Fry LJ; *Broomfield v Williams* [1897] 1 Ch 602 at 610, CA, per Lindley LJ.

9 *Langley v Hammond* (1868) LR 3 Exch 161 at 170-171, per Bramwell B; *Barkshire v Grubb* (1881) 18 ChD 616 at 622.

10 *Watts v Kelson* (1871) 6 Ch App 166 at 172 per Mellish LJ.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(3) CREATION BY IMPLICATION OF LAW/73. Grant by company.

73. Grant by company.

Easements cannot be implied upon a grant of land by a company created to carry out the purposes of an Act of Parliament if the easements would interfere with the execution of these purposes¹.

¹ *Myers v Catterson* (1889) 43 ChD 470 at 477, CA, per Cotton LJ. See also *South Eastern Rly Co v Associated Portland Cement Manufacturers (1900) Ltd* [1910] 1 Ch 12, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION / (i) Prescription generally/74. Nature of prescription.

(4) CREATION UNDER DOCTRINE OF PRESCRIPTION

(i) Prescription generally

74. Nature of prescription.

An easement may be established by a court of law sanctioning and upholding under the doctrine of prescription a claim to the right founded upon its enjoyment¹. In as much as the court's sanction is given solely upon the presumption that the easement has in fact validly existed before the claim is made, it is not strictly accurate to regard the doctrine of prescription as a mode of creating an easement; it is rather a mode of establishing an easement.

¹ *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263), p 51. As to claims by prescription to profits à prendre see PARA 274 et seq post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION
 /(i) Prescription generally/75. Methods of claiming prescriptive title.

75. Methods of claiming prescriptive title.

A title may be established by prescription in any one of three ways: first, prescription at common law; secondly, prescription under the doctrine of a lost modern grant¹; and thirdly, prescription as governed by the provisions of the Prescription Act 1832². This statute did not take away the other modes of claiming easements existing at the time of its being passed³, and it is now the common practice for a person seeking to establish a claim to an easement to claim it alternatively as acquired under each of these three methods⁴. However, he can only succeed upon one of them, and consequently pleads them at his own risk as to costs⁵. He must moreover show clearly in his pleadings which of these modes he intends to adopt, so that his adversary may be prepared for the case he has to meet, but it is commonly advisable to rely on them all in the alternative⁶.

1 Prescription under the doctrine of a lost modern grant is a species of common law prescription.

2 The operation of the Prescription Act 1832, or of the law of prescription, with reference to the acquisition of easements is not affected by the provisions of the Law of Property Act 1925 Pt I (ss 1-39) (as amended), which deals with legal estates and equitable interests in land and easements: see s 12.

3 *Aynsley v Glover* (1875) 10 Ch App 283; *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 238-239, HL; *Bright v Walker* (1834) 1 Cr M & R 211 at 222-223; *Dalton v Angus* (1881) 6 App Cas 740 at 814, HL; *Smith v Baxter* [1900] 2 Ch 138 at 146; *Hulbert v Dale* [1909] 2 Ch 570 at 578, CA; *Hyman v Van den Bergh* [1908] 1 Ch 167 at 177-178, CA. In *Hyman v Van den Bergh* supra at 176, Farwell LJ expressed the opinion that a claimant cannot evade the statutory defences of enjoyment under a written agreement or interruption for a year by setting up any mode of claim other than the statutory mode; but see *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390 at 392-393, CA.

4 See eg *Wheaton v Maple & Co* [1893] 3 Ch 48, CA; *Roberts and Lovell v James* (1903) 89 LT 282, CA; *Bailey v Stephens* (1862) 12 CBNS 91; *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390, CA. As to amending pleadings see *Budding v Murdock* (1875) 1 ChD 42; *Laird v Briggs* (1881) 19 ChD 22, CA; *Brown v Dunstable Corp*n [1899] 2 Ch 378 at 380, 387; *Gardner v Hodgson's Kingston Breweries Co* [1900] 1 Ch 592 at 601 (revsd [1901] 2 Ch 198, CA; [1903] AC 229, HL); see also *Smith v Baxter* [1900] 2 Ch 138 at 146-147.

5 *Harris v Jenkins* (1882) 22 ChD 481 at 482 per Fry J; *Palmer v Guadagni* [1906] 2 Ch 494 at 497 per Swinfen Eady J.

6 *Harris v Jenkins* (1882) 22 ChD 481; *Palmer v Guadagni* [1906] 2 Ch 494; *Smith v Baxter* [1900] 2 Ch 138 at 147; *Hyman v Van den Bergh* [1908] 1 Ch 167 at 169, CA; *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA; *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA (where at 543 and at 484 the existence of three separate methods of prescribing was described as undesirable and confusing); and see Court Forms. As to statements of case see now CIVIL PROCEDURE; and as to costs see generally CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION
/ (i) Prescription generally/76. Prescription based on presumed grant.

76. Prescription based on presumed grant.

The doctrine of prescription generally is based upon the presumption of a grant, the common law doctrine being that all prescription presupposes a grant¹ once made and validly subsisting, but since lost or destroyed². The other forms of prescription are merely modifications of this doctrine³. The presumption in the former instance of such a grant arises under the doctrine of prescription from the fact of enjoyment of the right⁴. It therefore follows that a right claimed by prescription must be such that it could have formed the subject matter of a grant⁵. Nothing which cannot have had a lawful beginning can be claimed by prescription⁶. Recourse can only be had to the doctrine of prescription in cases where a grant of the right is not forthcoming, for prescription has no place if a grant is proved and its terms are known⁷.

1 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, HL; *Lockwood v Wood* (1844) 6 QB 50 at 64, Ex Ch. In *Lord Dynevor v Richardson* [1995] Ch 173 at 183, [1995] 1 All ER 109 at 118 Knox J cited *Dalton v Angus* (1881) 6 App Cas 740 for the proposition that the whole of the law of prescription rests upon acquiescence. It must be shown that the servient owner had (1) a knowledge of the acts done; (2) a power to stop the acts or to sue in respect of them; and (3) an abstinence on his part from the exercise of such power.

2 *Goodman v Saltash Corpn* (1882) 7 App Cas 633 at 654-655, HL, per Lord Blackburn; *Lockwood v Wood* (1844) 6 QB 50 at 64, Ex Ch, per Tindal CJ; *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263), pp 51-52. A grant by the Crown may be presumed: *Goodman v Saltash Corpn* supra at 650; and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 867.

3 See *Bryant v Lefever* (1879) 4 CPD 172 at 177, CA, where Bramwell LJ said that the doctrine of a lost modern grant was merely ancillary to common law prescription, and only applicable where something prevents the application of the latter doctrine; *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, HL, where Lord Macnaghten doubted whether the scope and effect of the Prescription Act 1832 had been always understood, and said that the Act really did nothing more than shorten the time of prescription in certain cases. See also *Hulbert v Dale* [1909] 2 Ch 570 at 578, CA.

4 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) pp 51-52.

5 *Goodman v Saltash Corpn* (1882) 7 App Cas 633 at 654, HL, per Lord Blackburn; *Dalton v Angus* (1881) 6 App Cas 740 at 795, HL, per Lord Selborne LC; *Rowles v Mason* (1612) 2 Brownl 192 at 198 per Coke CJ.

6 *Lockwood v Wood* (1844) 6 QB 50, Ex Ch; *Gateward's Case* (1607) 6 Co Rep 59b; *Johnson v Barnes* (1872) LR 7 CP 592 at 604; affd (1873) LR 8 CP 527, Ex Ch; *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268 (pollution prohibited by statute); *Massey v Boulden* [2002] EWCA Civ 1634, [2003] 2 All ER 87, [2003] 1 WLR 1792.

7 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 239, HL, per Lord Lindley; *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390 at 392, CA; *Wheaton v Maple & Co* [1893] 3 Ch 48 at 69, CA. See also *Labrador Co v R* [1893] AC 104, PC; and see *Bury v Pope* (1588) Cro Eliz 118, where no prescriptive right to light was allowed as the house had only been built for 40 years. See also PARA 84 note 3 post.

UPDATE

76 Prescription based on presumed grant

NOTE 6--*Massey*, cited, overruled: *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519 (easement enabling vehicular access over common land acquired by prescription where use breached statutory prohibition).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION /(i) Prescription generally/77. Presumed grant is based on user.

77. Presumed grant is based on user.

In prescriptive claims the presumption of a former grant is raised by proof of long enjoyment, evidenced particularly in the case of positive or affirmative easements by acts of user on the part of the person claiming the easement or of his predecessors in title, and in the case of negative easements by passive enjoyment¹. As regards easements and similar incorporeal rights these acts of enjoyment are equivalent to the physical possession of corporeal property, an easement being incapable from its nature of forming the subject matter of actual physical possession.

1 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) pp 51-52.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION / (i) Prescription generally/78. Reason for application of doctrine of prescription.

78. Reason for application of doctrine of prescription.

The reason the doctrine of prescription is applied in law is that it is the policy of the law to do all it can to quiet titles so as to avoid litigation and preserve the security of property¹. Where an open and uninterrupted enjoyment of what appears to be an easement or other incorporeal right has continued for a long time the court will, where such enjoyment is wholly unexplained, presume, if it is reasonably possible, that the enjoyment is referable to a right which had a lawful origin².

1 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) p 39. See also *Foster v Warblington UDC* [1906] 1 KB 648 at 679 per Fletcher Moulton LJ; *Neaverson v Peterborough RDC* [1902] 1 Ch 557 at 573, CA, where Collins MR said that the court was endowed with a great power of imagination for the purpose of supporting ancient user.

2 *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335, [1999] 3 All ER 385, HL; *Davis v Whitby* [1974] Ch 186, [1974] 1 All ER 806, CA; *A-G v Simpson* [1901] 2 Ch 671 at 698, CA (revsd on another point sub nom *Simpson v A-G* [1904] AC 476, HL); *Simpson v Godmanchester Corpn* [1896] 1 Ch 214 at 218, CA (affd [1897] AC 696, HL); *Mercer v Denne* [1904] 2 Ch 534 at 556 (affd [1905] 2 Ch 538, CA); *Phillips v Halliday* [1891] AC 228 at 231, HL; *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1904] AC 64 at 69, HL; *Haigh v West* [1893] 2 QB 19, CA; and see *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION
/(i) Prescription generally/79. Presumption in favour of long user.

79. Presumption in favour of long user.

Every presumption is made in favour of long user¹. Not only ought the court to be slow to draw an inference of fact which would defeat a right that has been exercised during a long period, unless such inference is irresistible, but it ought to presume everything that it is reasonably possible to presume in favour of such a right². Where the user is equally consistent with two reasonable inferences, either of which would provide a lawful origin for the right enjoyed, the inference of a lost grant will not necessarily be drawn³.

1 *Whitstable Free Fishers and Dredgers Co v Gann* (1861) 11 CBNS 387 at 412 per Erle CJ; *revsd sub nom Gann v Free Fishers of Whitstable* (1865) 11 HL Cas 192; *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL; *Mercer v Denne* [1904] 2 Ch 534.

2 *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA; *Mercer v Denne* [1904] 2 Ch 534 at 556 (affd [1905] 2 Ch 538, CA); *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL; *Tilbury v Silva* (1890) 45 ChD 98 at 118, CA, per Bowen LJ; *Moody v Steggles* (1879) 12 ChD 261 at 264-265 per Fry LJ.

3 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 239, HL, per Lord Lindley; see also *Whelan v Leonard* [1917] 2 IR 323, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION
 /(i) Prescription generally/80. Grant presumed to be by owner in fee simple.

80. Grant presumed to be by owner in fee simple.

In all prescriptions, except as regards prescriptive claims to light under the Prescription Act 1832¹, the grant which is presumed is a grant by the owner of the fee simple of the servient tenement to the owner of the fee simple of the dominant tenement². The whole theory of prescription at common law militates against the presumption of any grant or covenant by anyone except an owner in fee³. For this reason, where an easement is claimed by prescription it must be claimed in favour of the fee simple of the dominant tenement as against the fee simple of the servient tenement⁴; however, it is sufficient to show that the user began against the fee simple owner, even though the servient tenement was subsequently settled or let⁵. Consequently, no easement can be claimed by prescription for an estate or interest less than a perpetual one⁶. For the same reason a tenant cannot acquire an easement by prescription against his landlord⁷, but by user over the land of a stranger he may gain a prescriptive right in fee for his landlord, which he will be able to enjoy as tenant⁸. An easement for an estate less than an absolute interest may, however, be created by express grant or may arise otherwise by operation of law⁹.

1 As to claims to light under the Prescription Act 1832 see PARA 237 post.

2 *Bright v Walker* (1834) 1 Cr M & R 211 at 221; *Wheaton v Maple & Co* [1893] 3 Ch 48, CA; *Kilgour v Gaddes* [1904] 1 KB 457 at 466, CA. As to whether a qualified right to an easement may be assumed under the doctrine of a lost modern grant see PARA 97 post.

3 *Wheaton v Maple & Co* [1893] 3 Ch 48 at 63, CA, per Lindley LJ.

4 *Kilgour v Gaddes* [1904] 1 KB 457 at 466, CA, per Romer LJ. There is an exception where a lessee has a unilateral right under the Law of Property Act 1925 s 153 (as amended) at any time and without anyone else's consent to enlarge his leasehold interest into a fee simple: *Bosomworth v Faber* (1992) 69 P & CR 288, [1992] NPC 155, CA.

5 *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA; *Diment v NH Foot Ltd* [1974] 2 All ER 785, [1974] 1 WLR 1427; and see PARA 86 post.

6 *Kilgour v Gaddes* [1904] 1 KB 457 at 466-467, CA; *Wheaton v Maple & Co* [1893] 3 Ch 48, CA.

7 *Kilgour v Gaddes* [1904] 1 KB 457, CA; *Large v Pitt* (1797) Peake Add Cas 152. This proposition does not, however, hold good with regard to claims to light under the Prescription Act 1832, as to which see *Frewen v Philipps* (1861) 11 CBNS 449, Ex Ch; *Mitchell v Cantrill* (1887) 37 ChD 56, CA; *Wheaton v Maple & Co* [1893] 3 Ch 48, CA; *Morgan v Fear* [1907] AC 425, HL.

8 *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA.

9 *Kilgour v Gaddes* [1904] 1 KB 457 at 466, CA. See PARA 50 ante.

UPDATE

80 Grant presumed to be by owner in fee simple

NOTE 9--See *Housden v Conservators of Wimbledon and Putney Commons* [2008] EWCA Civ 200, [2008] 3 All ER 1038 (Wimbledon and Putney Commons Act 1871 did not preclude conservators of Wimbledon Common from granting right of way).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION
/(ii) Prescription at Common Law./81. Basis of prescription at common law.

(ii) Prescription at Common Law.

81. Basis of prescription at common law.

Prescription at common law is based upon a presumed grant which the law assumed to have been made prior to 1189, the first year of the reign of Richard I. By the ancient rule of the common law, enjoyment of an easement has to be proved from time 'whereof the memory of man runneth not to the contrary', that is to say, during legal memory or since the commencement of the reign of Richard I¹.

¹ Co Litt 114b; *Chapman v Smith* (1754) 2 Ves Sen 506 at 514 per Lord Hardwicke LC; *Hulbert v Dale* [1909] 2 Ch 570 at 577, CA. For the different dates fixed from time to time as the commencement of legal memory, and for the reasons generally assigned for the alterations in the date see *Angus v Dalton* (1878) 4 QBD 162 at 170-171, CA, per Thesiger LJ; affd sub nom *Dalton v Angus* (1881) 6 App Cas 740, HL; *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335, [1999] 3 All ER 385, HL. As to claims by prescription at common law to profits à prendre see PARA 274 et seq post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION
/(ii) Prescription at Common Law./82. Time for which user must be proved.

82. Time for which user must be proved.

As it is usually impossible to prove user or enjoyment further back than the memory of living persons, proof of enjoyment as far back as living witnesses can speak raises a prima facie presumption of an enjoyment from the remoter era¹. Where evidence is given of the long enjoyment of a right to the exclusion of all other persons, enjoyed as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have arisen beyond legal memory².

Unexplained user of an easement or other incorporeal right for a period of 20 years is also held to be presumptive evidence of the existence of the right from time immemorial³, but the rule is not inflexible, the period of 20 years being only fixed as a convenient guide⁴. It is not, however, necessary in the case of a claim by prescription at common law to prove user for 20 years next before the proceedings in which the claim is made⁵.

1 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) p 51; *Jenkins v Harvey* (1835) 1 Cr M & R 877 at 894 per Parke B; *Bryant v Foot* (1868) LR 3 QB 497 at 505-506, Ex Ch, per Kelly CB; *Johnson v Barnes* (1872) LR 7 CP 592 at 604 (affd (1873) LR 8 CP 527, Ex Ch); *Bailey v Appleyard* (1838) 8 Ad & El 161 at 166 (where Littledale J said that if the claim in that case had been made by virtue of immemorial user, 28 years' enjoyment would have been some evidence); *Angus v Dalton* (1878) 4 QBD 162, CA; affd sub nom *Dalton v Angus* (1881) 6 App Cas 740, HL.

2 *Johnson v Barnes* (1872) LR 7 CP 592; affd (1873) LR 8 CP 527, Ex Ch.

3 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) pp 51-52; *Bealey v Shaw* (1805) 6 East 208 at 215 per Lord Ellenborough CJ; *Cox v Matthews* (1673) 1 Vent 237 at 239; *Partridge v Scott* (1838) 3 M & W 220 at 229 per Alderson B.

4 The period of 20 years appears to have been adopted in analogy to the Statute of Limitations: *Bright v Walker* (1834) 1 Cr M & R 211 at 217 per Parke B. See *Bealey v Shaw* (1805) 6 East 208, where Lord Ellenborough CJ said that less than 20 years' enjoyment might or might not afford a presumption of a grant according as it was attended with circumstances to support or rebut the right; see also *Whitstable Free Fishers and Dredgers Co v Gann* (1861) 11 CBNS 387 at 412-413 per Erle CJ; revsd sub nom *Gann v Free Fishers of Whitstable* (1865) 11 HL Cas 192. The following are instances of the periods of enjoyment which have been held sufficient to establish the right: *Hill v Smith* (1809) 10 East 476 at 486-487 (40 years' enjoyment; revsd on appeal upon other grounds (1812) 4 Taunt 520, Ex Ch); *Biddulph v Arthur* (1755) 2 Wils 23 at 25 (92 years' enjoyment); *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427 (250 years' enjoyment); *Hall v Lichfield Brewery Co* (1880) 49 LJ Ch 655 (enjoyment of air for upwards of 30 years).

5 *Darling v Clue* (1864) 4 F & F 329. As to effect of non-user, however, see PARA 90 post. As to claims under the Prescription Act 1832 see PARA 106 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION /(ii) Prescription at Common Law./83. Knowledge of servient owner.

83. Knowledge of servient owner.

If it is shown that an act of enjoyment has been often repeated, and must necessarily have been often repeated, with the knowledge of the persons interested in denying the right, a strong presumption is raised in favour of the right so exercised¹.

¹ *Bartlett v Downes* (1825) 3 B & C 616 at 621 per Abbott CJ. See generally *Sturges v Bridgman* (1879) 11 ChD 852 at 863, CA; *Dalton v Angus* (1881) 6 App Cas 740, HL; *Roberts and Lovell v James* (1903) 89 LT 282, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION / (ii) Prescription at Common Law./84. How claim may be defeated.

84. How claim may be defeated.

Notwithstanding that there is evidence of user or enjoyment for a great number of years, a right claimed by prescription at common law can be defeated by showing that it did not exist or could not have existed at any one point of time since the commencement of legal memory¹. Thus, even though it is shown to have originated before the commencement of legal memory, it may be defeated by proof that at some subsequent period the servient tenement and the dominant tenement belonged to the same individual, and that consequently the right was then extinguished, even if it was still treated as continuing². Again, a prescriptive claim may be defeated by proof of the existence of some deed of grant or other document dated since the commencement of legal memory, which originated or was likely to have originated the user³; but not if the grant can be shown to have been merely in confirmation of a prior prescriptive right⁴.

1 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) p 51. Thus in *Bury v Pope* (1588) Cro Eliz 118, upon its being shown that a house had not existed prior to some 40 years previously, a prescriptive claim to a right of light failed. Similarly, in *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390, CA, it was held that no prescriptive right to light at common law could exist in respect of a church which was shown to have been built since 1189. In *Hollins v Verney* (1884) 13 QBD 304 at 305, CA, it was conceded that the right claimed could not be established by immemorial prescription at common law, in as much as the right claimed could be shown to have originated in modern times. See also *Church v Tame* (1867) LR 2 CP 480n; *Bury v Pope* supra cited in *Dalton v Angus* (1881) 6 App Cas 740 at 822, HL; *Hulbert v Dale* [1909] 2 Ch 570 at 577, CA. As to the commencement of legal memory see PARA 81 ante.

2 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) p 51. Notwithstanding the dictum of Martin B in *Winship v Hudspeth* (1854) 10 Exch 5 at 8, it seems that unity of possession without unity of ownership will not destroy a claim by prescription at common law. Cf *Richardson v Graham* [1908] 1 KB 39, CA. As to extinguishment by unity of ownership see PARA 139 et seq post.

3 *Welcome v Upton* (1839) 5 M & W 398 at 404; *Welcome v Upton* (1840) 6 M & W 536; and see *R v Westmark, Tithing* (1840) 2 Mood & R 305; *Labrador Co v R* [1893] AC 104, PC. See also PARA 76 the text and note 7 ante.

4 *Addington v Clode* (1775) 2 Wm Bl 989; and cf *Earl of Carnarvon v Villebois* (1844) 13 M & W 313 at 342.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION / (ii) Prescription at Common Law./85. User must be as of right.

85. User must be as of right.

In order to support a prescriptive claim under the doctrine of prescription at common law, the user or enjoyment of an alleged right must be shown to have been user 'as of right'¹, having been enjoyed neither as the result of force, secrecy, or permission (*nec vi, nec clam, nec precario*)². Consent or acquiescence³ on the part of the servient owner lies at the root of prescription, and a grant cannot be presumed from long use without his having had knowledge or at least the means of knowledge⁴. He cannot be said to acquiesce in an act enforced by mere violence, or in an act which fear on his part hinders him from preventing⁵, or in an act of which he has no knowledge actual or constructive⁶, or which he contests and endeavours to interrupt⁷, or which he sanctions only for temporary purposes⁸ or in return for recurrent consideration⁹.

1 Co Litt 113b. For the meaning of 'as of right' see generally *Bright v Walker* (1834) 1 Cr M & R 211; *Tickle v Brown* (1836) 4 Ad & El 369 at 382-383; *Sturges v Bridgman* (1879) 11 ChD 852, CA; *Hanna v Pollock* [1900] 2 IR 664 at 671, CA; *Burrows v Lang* [1901] 2 Ch 502 at 511; *International Tea Stores Co v Hobbs* [1903] 2 Ch 165 at 171; *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268; *Alfred F Beckett v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA (toleration does not amount to user as of right); *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449, CA; *Loder v Gaden* (1999) 78 P & CR 223, [1999] All ER (D) 396, CA.

2 Co Litt 113b, 114a; *Solomon v Vintners' Co* (1859) 4 H & N 585; *Sturges v Bridgman* [1879] 11 ChD 852, CA; *Union Lighterage Co v London Graving Dock Co* [1901] 2 Ch 300 at 305; affd [1902] 2 Ch 557, CA. See also *Meacher v Blair-Oliphant* 1913 SC 417; *Schwann v Cotton* [1916] 2 Ch 459, CA (underground pipe); and COMMONS vol 13 (2009) PARA 473.

3 As to the distinction between consent or acquiescence and permission see *Davis v Whitby* [1974] Ch 186, [1974] 1 All ER 806, CA; and PARA 87 post.

4 *Sturges v Bridgman* (1879) 11 ChD 852, CA; *Dalton v Angus* (1881) 6 App Cas 740, HL. See further PARA 86 post.

5 This fear must, however, be of something other than mere legal proceedings.

6 *Dalton v Angus* (1881) 6 App Cas 740 at 801, HL, per Lord Selborne LC; *Liverpool Corpn v H Coghill & Son Ltd* [1918] 1 Ch 307 (secret noxious pollution of effluent). In *Davies v Du Paver* [1953] 1 QB 184, [1952] 2 All ER 991, CA (claim by prescription to a profit à prendre by grazing sheep), it was held that neither knowledge nor power to object could be imputed to the owner of the alleged servient tenement from common knowledge of the user in the locality; and a fortiori where during most of the period relied on the servient tenement was in the occupation of sitting tenants: see *Barney v BP Truckstops* [1995] NPC 5 (user of pipe, although not surreptitious, was unknown and unsuspected by alleged servient owner; easement could not be established); *Ironside, Crabb and Crabb v Cook, Cook and Barefoot* (1978) 41 P & CR 326, CA (nothing to put alleged servient owner on notice that a right of way was being asserted). See also *Daniel v North* (1809) 11 East 372, not cited in *Davies v Du Paver* supra.

7 *Eaton v Swansea Waterworks Co* (1851) 17 QB 267; *Dalton v Angus* (1881) 6 App Cas 740 at 786, HL, per Bowles LJ. User by force is not user 'as of right'; where the person claiming the right knows that there are objections to his claim, user is user by force: *Newham v Willison* (1987) 56 P & CR 8, CA. This decision is questioned in Gale on Easements (17th Edn, 2002) at paras 4-75-4-76 (pp 211-212) but was followed in *Smith v Brudenell-Bruce* [2002] 2 P & CR 51, [2001] All ER (D) 03 (Jul), where although the claim under the Prescription Act 1832 failed, it succeeded on the basis of a lost modern grant because there had been 20 years' user before the letters of protest.

8 *Sturges v Bridgman* (1879) 11 Ch 852, CA; *Foster v Richmond* (1910) 9 LGR 65 at 70 (user sanctioned for removal of refuse).

9 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, HL. See PARA 88 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION
/(ii) Prescription at Common Law./86. Ignorance of servient owner.

86. Ignorance of servient owner.

The servient owner's actual ignorance of the exercise or enjoyment of the alleged right will not in every case prevent the enjoyment from being as of right. There are some things which every person ought to be presumed to know, at any rate while in occupation¹. Very slight circumstances may put the servient owner upon inquiry, and if he neglects to make inquiry it may be that knowledge must be imputed to him². Where an ordinary owner of land, diligent in the protection of his interests, would have a reasonable opportunity of becoming aware of the enjoyment by another person of a right over his land, he cannot allege that it was secret³. If, however, the enjoyment is fraudulent or surreptitious, it cannot support a prescriptive claim⁴.

The presumption of knowledge can be rebutted by evidence that the servient owner did not have the knowledge imputed to him⁵. The presumption does not extend to the servient owner's agent, and unless the person alleging the right can prove that the agent knew or had means of knowing of the user a servient owner who can rebut the presumption on his own account will not be imputed with any deemed knowledge on his agent's part⁶.

1 *Dalton v Angus* (1881) 6 App Cas 740, HL; *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557, CA; *Lloyds Bank Ltd v Dalton* [1942] Ch 466, [1942] 2 All ER 352.

2 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 569, CA, per Vaughan Williams LJ; *Longton v Winwick Asylum Visitors Committee* (1911) 75 JP 348 (reply to requisitions on title as to easements; on appeal (1912) 76 JP 113, CA); *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA; *Diment v NH Foot Ltd* [1974] 2 All ER 785, [1974] 1 WLR 1427.

3 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 571, CA, per Romer LJ. See also *Partridge v Scott* (1838) 3 M & W 220, where Alderson B said that apart from the Prescription Act 1832 the court would have said that a grant of an easement ought not to be inferred from any lapse of time short of 20 years after the servient owners 'might have been or were fully aware of the facts'.

4 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557, CA; *Liverpool Corpn v H Coghill & Son Ltd* [1918] 1 Ch 307.

5 *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA. See also PARA 80 ante.

6 *Diment v NH Foot Ltd* [1974] 2 All ER 785, [1974] 1 WLR 1427.

UPDATE

86 Ignorance of servient owner

NOTES--See also *Williams v Sandy Lane (Chester) Ltd* [2006] EWCA Civ 1738, [2006] All ER (D) 245 (Dec) (servient owner could not defeat easement by claiming that by leasing the servient tenement he had disabled himself from preventing the user).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION / (ii) Prescription at Common Law./87. Permission of servient owner.

87. Permission of servient owner.

Enjoyment of an alleged right which has taken place with the licence of the owner of the servient tenement is not enjoyment as of right¹, for if a person who claims an easement or other incorporeal right has exercised the right, not in the manner in which a person rightfully entitled to it would have used it, but has even occasionally asked the permission of the servient owner, no title can be acquired under the doctrine of prescription². There is no such thing as a precarious easement³. If the servient owner can, whether the dominant owner likes it or not, put a stop to the alleged easement, there is no easement at all, because the very idea of right which necessarily underlies an easement is negatived⁴. It is, however, clearly established that mere acquiescence in or toleration of the user by the servient owner cannot prevent the user being user as of right for purposes of prescription⁵. Conversely it appears that where a right of way is claimed, if the owner of the alleged servient tenement were to put up a notice on the road stating unequivocally that anyone using the road was using it only by the permission of the servient owner and that permission might be withdrawn at any time, user of the road thereafter would be by permission (*precario*)⁶.

1 Co Litt 113b, 114a; *Bright v Walker* (1834) 1 Cr M & R 211 at 219; *Tickle v Brown* (1836) 4 Ad & El 369 at 382, 383; *Hanna v Pollock* [1900] 2 IR 664 at 671, CA; *Burrows v Lang* [1901] 2 Ch 502 at 511; *International Tea Stores Co v Hobbs* [1903] 2 Ch 165 at 171; *Plasterers' Co v Parish Clerks' Co* (1851) 6 Exch 630 at 633; *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, HL.

2 *Bright v Walker* (1834) 1 Cr M & R 211; and see *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609. But see *Davis v Whitby* [1974] Ch 186, [1974] 1 All ER 806, CA; and PARA 85 ante. Acquiescence in or tolerance of user is not same as user by permission and so is not inconsistent with the concept of user as of right: *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449, CA.

3 *Burrows v Lang* [1901] 2 Ch 502 at 510-511 per Farwell J ('What is precarious? That which depends not on right, but on the will of another person').

4 *Burrows v Lang* [1901] 2 Ch 502.

5 *Bridle v Ruby* [1989] QB 169, [1988] 3 All ER 64, CA; *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449, CA; *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335, [1999] 3 All ER 385, HL; *R (on the application of Beresford) v Sunderland City Council* [2001] EWCA Civ 1218, [2002] QB 874, [2001] 4 All ER 565. The last two cases are actually decisions on the Commons Registration Act 1965 but it is made clear that the words 'as of right' in s 22(1) (as amended) have the same meaning as they have in the Prescription Act 1832 and the Rights of Way Act 1932.

6 *Rafique v Trustees of the Walton Estate* (1992) 65 P & CR 356.

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88. Payment for use.

A payment made from time to time may be evidence that the user of the alleged easement was not user 'as of right'¹, for one of the most common modes of preventing a user growing into a right is to insist upon a small periodical payment by the person enjoying the alleged easement².

1 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 238, HL; cf *Tickle v Brown* (1836) 4 Ad & El 369; *Plasterers' Co v Parish Clerks' Co* (1851) 6 Exch 630.

2 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 231, HL, per Lord Halsbury LC.

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89. Mistake of rights; unity of possession.

Where an alleged easement is shown to have been enjoyed by reason of a mistaken view of the rights of the parties entertained by both the dominant and the servient owner, there is no enjoyment as of right upon which a prescriptive claim to the easement can be based¹. Where a lessee has exercised a right under the assumption that the lease authorised his doing so, and the lessor has acquiesced under the same assumption, the lessee cannot ground a prescriptive claim to the right upon such enjoyment². There is no enjoyment as of right so long as the dominant and servient tenements are in the possession of the same person³.

1 *Chamber Colliery Co v Hopwood* (1886) 32 ChD 549, CA (watercourse made on land held under a lease); *Campbell v Wilson* (1803) 3 East 294 at 301-302, per Lawrence J; *Lord Rivers v Adams* (1878) 3 Ex D 361; but see *Earl De La Warr v Miles* (1881) 17 ChD 535, CA; *Dawson v M'Grogan* [1903] 1 IR 92. See also *Bridle v Ruby* [1989] QB 169, [1988] 3 All ER 64, CA.

2 *Chamber Colliery Co v Hopwood* (1886) 32 ChD 549 at 557, CA; *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep 472, CA.

3 *Battishill v Reed* (1856) 18 CB 696; *Onley v Gardiner* (1838) 4 M & W 496; *Damper v Bassett* [1901] 2 Ch 350; *Outram v Maude* (1881) 17 ChD 391 at 405; *Harbidge v Warwick* (1849) 3 Exch 552.

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 /(ii) Prescription at Common Law./90. Enjoyment must be continuous.

90. Enjoyment must be continuous.

Continuity of user is essential in order to establish an easement¹, for, unless satisfactorily explained, long intervals between the acts of user go far towards defeating the right². The period of non-user of an alleged right which will defeat a prescriptive claim has no fixed length. The user need not be constant³, but where it has not been constant the evidence should show that the cessation of the user was not due to the interference by the owner of the servient tenement. So long as there is continuity of user over some part of the servient tenement it does not matter that the precise mode of user is varied, at least if done with the acquiescence and knowledge of the servient owner⁴.

The degree of continuity required differs according to whether the easement to be acquired is positive (or affirmative) or negative. The enjoyment of an alleged right capable of constituting a positive easement consists in acts done upon the servient tenement, each of which, since it constitutes a direct interference with the servient owner's enjoyment, is capable of being resisted by legal proceedings as well as by physical interruption, and gives the servient owner a cause of action which he neglects at his peril. The enjoyment, however, of an alleged right capable of constituting a negative easement does not in general give any cause of action and cannot be interrupted except by acts of obstruction done upon the servient tenement⁵. Similarly, acts done by the owner of the so-called dominant tenement on his own land cannot amount to enjoyment as of right capable of supporting a prescriptive claim unless and until they amount to actionable wrongs to the owner of the supposed servient tenement⁶. A prescriptive right of way entitles the owner of the dominant land to effect repairs to the path or road but does not entitle him to carry out improvements which would benefit his own land to the detriment of the owners of the land over which the right of way is exercised⁷.

1 *Ward v Ward* (1852) 7 Exch 838; *R v Chorley* (1848) 12 QB 515; *Stokoe v Singers* (1857) 8 E & B 31; *Moore v Rawson* (1824) 3 B & C 332. Cf *Dare v Heathcote* (1856) 25 LJ Ex 245; *Hall v Swift* (1838) 4 Bing NC 381; *Bennison v Cartwright* (1864) 5 B & S 1; *Hollins v Verney* (1884) 13 QBD 304, CA.

2 *Hollins v Verney* (1884) 13 QB 304, CA; *Moore v Rawson* (1824) 3 B & C 332; *R v Chorley* (1848) 12 QB 515. Cf *Carr v Foster* (1842) 3 QB 581; *Ward v Ward* (1852) 7 Exch 838; *Davis v Morgan* (1825) 4 B & C 8; *M'Inroy v Duke of Athole* [1891] AC 629, HL (a Scottish case).

3 1 Bl Com (14th Edn) 76. Cf *Hammerton v Honey* (1876) 24 WR 603 per Jessel MR.

4 See *Davis v Whitby* [1974] Ch 186, [1974] 1 All ER 806, CA (route of right of way varied during period of prescription).

5 *Sturges v Bridgman* (1879) 11 ChD 852 at 864, CA.

6 *Sturges v Bridgman* (1879) 11 ChD 852 at 864, CA, per Thesiger LJ, where it was held that an alleged easement to make a noise upon the dominant tenement gave no right to an easement because the noise had not been an actionable nuisance for a sufficient period.

7 *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449, CA.

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(iii) Prescription under Doctrine of Lost Modern Grant

91. Origin of doctrine of lost modern grant.

The method of claiming easements under the doctrine of a lost modern grant¹ was the outcome of the facility with which claims under the common law doctrine of prescription were capable of being defeated² merely by showing that the right did not or could not exist at any one point of time since the commencement of legal memory³. By founding a claim on the presumption of a grant at some comparatively modern date, this ready method of defence is evaded, since proof of the non-existence of the right prior to the date of the alleged modern grant is ex hypothesi immaterial⁴. The courts, following their usual rule in favour of the presumption that an alleged right had a legal origin when proof of long enjoyment can be shown, have readily adopted this convenient fiction⁵.

1 This mode of prescription has been successfully adopted in the following cases: *Cowlam v Slack* (1812) 15 East 108 (where the presumption was made upon 50 years' user); *Rolle v Whyte* (1868) LR 3 QB 286; *Leconfield v Lonsdale* (1870) LR 5 CP 657 at 726 (where a lost modern grant was presumed of a right to maintain a coop in a dam for catching fish, the coop having existed for upwards of 120 years); *Bass v Gregory* (1890) 25 QBD 481 (grant of a right to air to a cellar through a defined channel); *Phillips v Halliday* [1891] AC 228, HL, and *Stileman-Gibbard v Wilkinson* [1897] 1 QB 749 (where a lost grant of a faculty assuring the right to a pew was presumed); *Haigh v West* [1893] 2 QB 19, CA (where a lost grant not requiring enrolment was presumed); *Simpson v Godmanchester Corp* [1897] AC 696, HL (where a lost grant was presumed of a right to open sluices in time of flood to avoid damage to the dominant tenement); *Hulbert v Dale* [1909] 2 Ch 570, CA (where a grant of way was presumed over an awarded but unmade road). See also *A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599 at 619, PC (transfer of ownership of land cannot be effected without presumption of a lost grant or without possession during the full requisite period of prescription). As to claims to profits à prendre by lost grant see PARA 274 post. As to the presumption of lost grants from the Crown see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 867.

2 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) p 51; *Penwarden v Ching* (1829) Mood & M 400.

3 See PARA 81 ante.

4 *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) p 51.

5 *Bryant v Foot* (1867) LR 2 QB 161 at 181 (affd (1868) LR 3 QB 497); *Aynsley v Glover* (1875) 10 Ch App 283 at 285; *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 238-239, HL; *Dalton v Angus* (1881) 6 App Cas 740 at 800, 814, HL; *Hulbert v Dale* [1909] 2 Ch 570 at 578, CA. The introduction of the fiction of a lost modern grant would appear to have taken place towards the end of the eighteenth or early in the nineteenth century: see the *First Report of the Real Property Commissioners* (H of C Paper (1829) no 263) p 51, which speaks of the then recent introduction of the doctrine. The earliest reported decision is *Lewis v Price* (1761) 2 Wms Saund 175a.

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92. Length of user from which lost grant is presumed.

The courts first laid down the rule that from the user of a lifetime the presumption arose that a similar user had existed from time immemorial. As it could not but happen that in many cases such a presumption was impossible, in order to support possession and enjoyment, which the law ought to have invested with the character of rights, recourse was had to the theory of lost modern grants. At first juries were told that from user during living memory, or even during 20 years, they might presume a lost grant. Subsequently they were told that they not only might, but were bound to, presume the existence of such a lost grant¹, and now where there has been upwards of 20 years' enjoyment of a right, the right will be presumed to have had a legal origin, if such an origin was possible, and the courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title². The presumption can only be rebutted by evidence that the existence of such a grant is impossible; nothing short of such evidence will suffice and a judge is not entitled to refuse to presume a grant merely because he is convinced that it was never in fact granted³.

1 *Bryant v Foot* (1867) LR 2 QB 161 at 181 per Cockburn CJ; *Mounsey v Ismay* (1865) 3 H & C 486 at 496.

2 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA. See also *Phillips v Halliday* [1891] AC 228 at 231, HL; *Simpson v Godmanchester Corp* [1896] 1 Ch 214 at 218, CA (on appeal [1897] AC 696, HL); *A-G v Simpson* [1901] 2 Ch 671 at 698 per Farwell J (on appeal sub nom *Simpson v A-G* [1904] AC 476, HL); *Haigh v West* [1893] 2 QB 19 at 28 et seq, CA; *Hulbert v Dale* [1909] 2 Ch 570 at 578, CA; *Earl Dysart v Hammerton & Co* [1914] 1 Ch 822, CA (revsd sub nom *Hammerton v Earl Dysart* [1916] 1 AC 57, HL (ferry franchise; presumption of legal origin)); *General Estates Co v Beaver* [1914] 3 KB 918, CA (presumption of franchise of ferry from vill to vill); *Ward (Helston) Ltd v Kerrier District Council* [1984] RVR 18, Lands Tribunal.

3 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA (circumstantial evidence insufficient to negative the fiction); disapproving *A-G v Simpson* [1901] 2 Ch 671 at 698 per Farwell J; and *White v Taylor (No 2)* [1969] 1 Ch 160 at 195, [1968] 1 All ER 1015 at 1034 per Buckley J.

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93. When presumption will be made.

The doctrine of a lost modern grant is in general only used as ancillary to a claim to prescription at common law, and is resorted to in cases where for some reason prescription at common law or under the provisions of the Prescription Act 1832¹ cannot be adopted².

There is no need to resort to the presumption of a lost modern grant when the facts of the case, so far as they are known, suggest a much simpler and a more natural explanation³. The doctrine only applies where the enjoyment cannot be otherwise reasonably accounted for⁴; and it is not reasonable to imply a lost grant where a tenancy was in existence at the beginning of the period of user⁵. The court is slow to presume a lost grant in support of a prescriptive claim by a riparian owner to receive the augmentation in the flow of a river caused by the discharge of an effluent into it upstream through an artificial watercourse⁶.

A mistaken belief that a right of way had been expressly granted was held not to rebut the presumption of a lost modern grant⁷.

1 See PARA 99 et seq post.

2 *Bryant v Lefever* (1879) 4 CPD 172 at 177, CA; and see *Mounsey v Ismay* (1865) 3 H & C 486; *Hulbert v Dale* [1909] 2 Ch 570, CA

3 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 235, HL, per Lord Macnaghten; *Foster v Richmond* (1910) 9 LGR 65.

4 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 240, HL, per Lord Lindley; *A-G v Horner* (1884) 14 QBD 245 at 258, CA (affd (1885) 11 App Cas 66, HL); *Lyell v Lord Hothfield* [1914] 3 KB 911; *Bridle v Ruby* [1989] QB 169, [1988] 3 All ER 64, CA; and cf *R v Hudson* (1732) 2 Stra 909.

5 *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA; *Diment v NH Foot Ltd* [1974] 2 All ER 785, [1974] 1 WLR 1427; and see PARA 96 post.

6 *John S Deed & Sons Ltd v British Electricity Authority and Croydon Corpn* (1950) 114 JP 533.

7 See *Bridle v Ruby* [1989] QB 169, [1988] 3 All ER 64, CA.

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94. Nature and evidence of user.

As in the case of prescription at common law, user under a lost modern grant must be 'as of right'¹.

The evidence of user necessary to raise the presumption of a lost modern grant depends upon the circumstances of each particular case². If the grant sought to be presumed is one affecting the rights of a large number of the public, and one of which, if it really ever existed, there might reasonably be supposed to be some public record, and if the period of user is comparatively short, it is more difficult to infer the existence of the grant than where it is sought to presume a grant by some single and clearly competent owner³.

As a general rule the evidence of user necessary to induce the court to presume a lost modern grant must be stronger than that upon which the court will presume a grant upon immemorial user⁴, for where the party opposing the claim shows that the user did not at one time exist, the presumption of a modern grant becomes a more violent inference than the presumption of an ancient grant based upon immemorial user⁵. Direct evidence that the grant was never made is inadmissible to rebut the presumption of a lost modern grant raised by the uninterrupted user⁶. The presumption of acquiescence is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct⁷.

1 *Solomon v Vintners' Co* (1859) 4 H & N 585 at 602; *Sturges v Bridgman* (1879) 11 ChD 852 at 863, CA; *Union Lighterage Co v London Graving Dock Co* [1901] 2 Ch 300 at 305, 306 (affd [1902] 2 Ch 557, CA); *Partridge v Scott* (1838) 3 M & W 220; *Bridle v Ruby* [1989] QB 169, [1988] 3 All ER 64, CA. As to user as of right see PARA 85 ante. As to prescription for the easement of light by methods other than statutory prescription under the Prescription Act 1832 s 3 (as amended) see PARA 236 post. In practice statutory prescription is, from the nature of this easement, nearly always the mode relied on, and under s 3 (as amended) need not be as of right; but see *Tisdall v McArthur & Co (Steel and Metal) Ltd* [1951] IR 228 at 235-243. See also *Smith v Brudenell-Bruce* [2002] 2 P & CR 51, [2001] All ER (D) 03 (Jul).

2 See eg *Tilbury v Silva* (1890) 45 ChD 98 at 122-123, CA; and see *Bridle v Ruby* [1989] QB 169, [1988] 3 All ER 64, CA (mistaken belief that right of way expressly granted did not rebut presumption of lost modern grant).

3 See *Neaverson v Peterborough RDC* [1902] 1 Ch 557 at 564, CA, per Collins MR.

4 *Tilbury v Silva* (1890) 45 ChD 98, CA, per Bowen LJ: 'if it was a case of immemorial enjoyment from time out of mind for which we were asked to find a legal origin, I would strain a point to find it; but what we have to deal with is a user since 1845, and there is nothing to justify us in making such a violent presumption as that there is a lost grant'.

5 *Tilbury v Silva* (1890) 45 ChD 98, CA.

6 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA (where *Angus v Dalton* (1877) 3 QBD 85, DC; on appeal (1878) 4 QBD 162, CA; affd sub nom *Dalton v Angus* (1881) 6 App Cas 740, HL, was considered in detail).

7 *Angus v Dalton* (1878) 4 QBD 162 at 172-173, CA, per Thesiger LJ; see generally *Duke of Norfolk v Arbutnot* (1880) 5 CPD 390 at 393, CA; *Earl De la Warr v Miles* (1881) 17 ChD 535 at 591, CA; and see cases of prescriptive claims to the easement of support cited in para 186 et seq post.

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95. Charter or enrolment.

The doctrine of a lost modern grant is not confined to cases of a simple grant by one person to another. It has been applied so as to presume the loss of a charter from the Crown¹, the loss of faculties confirming rights² and the loss of a grant ordinarily requiring enrolment, with the further presumption that the grant was exempt from enrolment³, and possibly that an award could be presumed⁴. Even enrolment of a deed, where absolutely necessary, may possibly be presumed⁵. A surrender of a charter from the Crown may also be presumed under the same doctrine⁶. Even the waiver of statutory provisions which, unless waived, would have prevented the existence of the right claimed, may be presumed, provided the statute is not of a general and public nature⁷.

1 *Goodtitle d Parker v Baldwin* (1809) 11 East 488; see also *A-G v Horner* (1884) 14 QBD 245 at 263, CA. There may, however, be considerable difficulty in presuming a lost modern grant from the Crown: see *Wheaton v Maple & Co* [1893] 3 Ch 48 at 62, 67, CA.

2 *Phillips v Halliday* [1891] AC 228, HL; *Stileman-Gibbard v Wilkinson* [1897] 1 QB 749.

3 *Haigh v West* [1893] 2 QB 19, CA.

4 *East Stonehouse UDC v Willoughby Bros Ltd* [1902] 2 KB 318 at 332 per Channell J.

5 *Doe d Howson v Waterton* (1819) 3 B & Ald 149. But cf *A-G v Moor* (1855) 20 Beav 119; *MacDougall v Purrier* (1830) 2 Dow & Cl 135, HL.

6 *A-G v Simpson* [1901] 2 Ch 671 at 716, CA, per Stirling LJ; revsd on other grounds sub nom *Simpson v A-G* [1904] AC 476, HL.

7 *Goldsmid v Great Eastern Rly Co* (1883) 25 ChD 511, CA; affd (1884) 9 App Cas 927, HL.

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96. Illegality or impossibility.

Although the court readily infers a legal origin for the purpose of supporting ancient user, it will not infer an origin which would involve illegality¹. The court will not presume a lost modern grant which, had it ever existed, would have been in contravention of the provisions of a public statute² or of a custom³. Nor will it presume a lost modern grant in cases where there was no person who could ever have made such a grant⁴, or where there was no person or persons competent to receive the particular grant⁵.

The court will not readily presume the loss of a succession of modern grants⁶; nor will it ever presume a lost modern grant of a right which could not form the subject matter of an express grant or of a prescriptive claim under the doctrine of prescription at common law⁷.

1 *Neaverson v Peterborough RDC* [1902] 1 Ch 557 at 573, CA, per Collins MR; *Rochdale Canal Co v Radcliffe* (1852) 18 QB 287. See also *Clayton v Corby* (1843) 5 QB 415; *Goodman v Saltash Corpn* (1882) 7 App Cas 633 at 648, HL; *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268 (pollution prohibited by the Rivers Pollution Prevention Act 1876 (repealed)); *Green v Matthews & Co* (1930) 46 TLR 206 (similar case). The provisions of the Water Resources Act 1991 s 85 et seq (as amended) relating to pollution offences make it at least very difficult now to establish a prescriptive right to pollute.

2 *Neaverson v Peterborough RDC* [1902] 1 Ch 557, CA (where the suggested grant would have involved the infringement of an Inclosure Act); *Goodtitle d Parker v Baldwin* (1809) 11 East 488; *Mill v New Forest Comr* (1856) 18 CB 60. See also *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268; *Green v Matthews & Co* (1930) 46 TLR 206; *Fowley Marine (Emsworth) Ltd v Gafford* [1967] 2 QB 808 at 840, [1967] 2 All ER 472 at 490 (contrary to byelaws); *revsd on another point* [1968] 2 QB 618, [1968] 1 All ER 979, CA.

3 *Wynstanley v Lee* (1818) 2 Swan 333; *Perry v Eames* [1891] 1 Ch 658 at 667; *Bowring Services Ltd v Scottish Widows' Fund and Life Assurance Society* [1995] 1 EGLR 158, [1995] 16 EG 206. Prescription for light under the Prescription Act 1832 s 3 (as amended) is by the terms of the section paramount to any local usage or custom to the contrary.

4 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA. See also *Barker v Richardson* (1821) 4 B & Ald 579 (where the court refused to presume a lost modern grant by a rector who had no power to bind his successors by making a grant of a perpetual easement over the glebe land); *Rochdale Canal Co v Radcliffe* (1852) 18 QB 287 at 315; *Neaverson v Peterborough RDC* [1902] 1 Ch 557, CA; *Roberts and Lovell v James* (1903) 89 LT 282, CA; *Daniel v North* (1809) 11 East 372; *Staffordshire and Worcestershire Canal Navigation (Proprietors) v Birmingham Canal Navigation (Proprietors)* (1866) LR 1 HL 254; *Wood v Veal* (1822) 5 B & Ald 454; *Pugh v Savage* [1970] 2 QB 373, [1970] 2 All ER 353, CA (unreasonable to presume lost modern grant where tenancy of the servient tenement is in existence at beginning of period of user); *Oakley v Boston* [1976] QB 270, [1975] 3 All ER 405, CA (acquiescence of incumbent in use of path failed to establish lost modern grant as Ecclesiastical Commissioners had not consented). See also *Re St Martin Le Grand, York, Westminster Press Ltd v St Martin with St Helen, York (Incumbent and Parochial Church Council)* [1990] Fam 63, [1989] 2 All ER 711, Consist Ct; and see PARA 93 ante.

5 *Tilbury v Silva* (1890) 45 ChD 98 at 118, 122-123, CA; *Neaverson v Peterborough RDC* [1902] 1 Ch 557, CA. Cf however *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL; and see PARA 276 post.

6 *Tilbury v Silva* (1890) 45 ChD 98 at 122-123, CA; but see *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA; disapproving *White v Taylor (No 2)* [1969] 1 Ch 160 at 195, [1968] 1 All ER 1015 at 1034 per Buckley J; and see also PARA 92 ante.

7 *Bryant v Lefever* (1879) 4 CPD 172 at 177, CA; and see *Palmer v Bowman* [2000] 1 All ER 22, [2000] 1 WLR 842, CA (the natural drainage of percolating and undefined surface water from one piece of land to another, lower piece of land is an incident of ownership of the higher land and cannot form the subject matter of an easement). As to an easement of drainage see eg *Green v Lord Somerleyton* [2003] EWCA Civ 198, [2003] 10 LS Gaz R 31, [2003] All ER (D) 426 (Feb).

UPDATE

96 Illegality or impossibility

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION /(iii) Prescription under Doctrine of Lost Modern Grant/97. Presumed grant must be a fee simple grant.

97. Presumed grant must be a fee simple grant.

The grant presumed under the doctrine of a lost modern grant is an absolute one by some owner of the servient tenement to some owner of the dominant tenement, and is presumed to have been made in respect of the fee simple in both tenements¹. Consequently no easement can be prescribed for under the doctrine unless it is a perpetual one², and no title is gained by user which does not give a valid title against all persons interested in the servient tenement³.

1 *Kilgour v Gaddes* [1904] 1 KB 457, CA; *Wheaton v Maple & Co* [1893] 3 Ch 48 at 63, CA; *Simmons v Dobson* [1991] 4 All ER 25, CA (leaseholder could not claim against another leaseholder holding under the same landlord); and see PARA 80 ante.

2 *Wheaton v Maple & Co* [1893] 3 Ch 48 at 63, CA. The rule set out in the text that the presumed grant under the doctrine of a lost modern grant must be taken to have been an absolute one has not always been recognised. In *Bright v Walker* (1834) 1 Cr M & R 211 at 221, per Parke B, it was said that user by a lessee for lives, though not effectual towards establishing a prescriptive right under the Prescription Act 1832 would, prior to that Act, have been evidence to support a plea or claim by reason of a lost grant from a lessee for lives of the servient tenement to a lessee for lives of the dominant tenement, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. In *Wheaton v Maple & Co* supra, Lindley LJ said that he was not aware of any authority for presuming, as a matter of law, a lost grant by a lessee for years in the case of ordinary easements, or a lost covenant in the case of light, and he said that he was certainly not prepared to introduce another fiction to support a claim to a novel prescriptive right. He also stated that this view was entirely in accordance with *Bright v Walker* supra. See also *Simmons v Dobson* [1991] 4 All ER 25, [1991] 1 WLR 720, CA (leaseholder could not claim against another leaseholder holding under same landlord).

3 *Bright v Walker* (1834) 1 Cr M & R 211 at 221 per Parke B.

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98. Pleading a lost grant.

A person seeking to establish a claim to an easement under this doctrine should plead a lost grant¹, but need not state in his pleadings the date of and the names of the parties to the alleged modern grant². The court will not order particulars of an alleged lost grant³.

1 *Smith v Baxter* [1900] 2 Ch 138. However, the court sometimes permits a lost grant to be pleaded by amendment at the trial: *Brown v Dunstable Corpn* [1899] 2 Ch 378 at 387; *Gardner v Hodgson's Kingston Breweries Co* [1900] 1 Ch 592 at 601; on appeal [1903] AC 229, HL. As to statements of case and amendments thereto see generally CIVIL PROCEDURE.

2 *Palmer v Guadagni* [1906] 2 Ch 494; *Duke of Norfolk v Arbuthnot* (1879) 4 CPD 290 at 293; affd (1880) 5 CPD 390, CA.

3 *Gabriel Wade and English Ltd v Dixon and Cardus Ltd* [1937] 3 All ER 900; but see *Tremayne v English Clays, Lovering Pochin & Co Ltd* [1972] 2 All ER 234, [1972] 1 WLR 657 (order that party claiming a lost modern grant plead whether or not it was made before or after various dates specified by the supposed grantor).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION /(iv) Prescription under the Prescription Act 1832/99. Object of the Prescription Act 1832.

(iv) Prescription under the Prescription Act 1832

99. Object of the Prescription Act 1832.

The Prescription Act 1832 was passed, as its preamble declared, for the purpose of getting rid of the inconvenience and injustice arising from the meaning which the law attaches to the expressions 'time immemorial' and 'time whereof the memory of man runneth not to the contrary'¹, and removing the strain supposed to be inflicted upon the consciences of judges and juries by the presumption of lost grants². The statute, however, only applies to prescription by a person and his predecessors in title to some tenement³. As all prescription is founded on a presumed grant⁴, and no grant can be made to an undefined and fluctuating body of persons⁵, no easement in favour of such a body can be claimed under the Act⁶; similarly an easement for a limited time only may not be acquired by prescription⁷.

1 Prescription Act 1832, preamble; and see PARA 81 ante. For the provisions of the Act relating to prescriptive claims to profits à prendre see PARA 274 post; and COMMONS vol 13 (2009) PARA 473.

2 *Gardner v Hodgson's Kingston Brewery Co*[1903] AC 229 at 236, HL, per Lord Macnaghten.

3 *Shuttleworth v Le Fleming* (1865) 19 CBNS 687; *Mounsey v Ismay* (1865) 3 H & C 486; *Mercer v Denne*[1904] 2 Ch 534 at 540; affd [1905] 2 Ch 538, CA; *Ramsgate Corp v Debling* (1906) 22 TLR 369. There are two kinds of prescription: prescription in a person or his ancestors (which was generally referred to as prescription in gross), and prescription in a person and those whose estate he has (which was generally referred to as prescription in a 'que' estate): see *Austin v Amhurst*(1877) 7 ChD 689 at 692 per Fry J. As easements cannot exist as rights in gross (see PARA 10 ante), prescription in gross is dealt with later only as regards profits à prendre: see PARA 274 post.

4 *Gardner v Hodgson's Kingston Brewery Co*[1903] AC 229 at 239, HL; and see PARA 76 ante.

5 *Lord Rivers v Adams* (1878) 3 ExD 361 at 364; and see PARA 41 ante.

6 *Mounsey v Ismay* (1865) 3 H & C 486. Further, the Prescription Act 1832 is not available to support claims to profits à prendre in gross as distinct from profits à prendre appurtenant: see PARA 274 the text and note 3 post.

7 See PARA 248 the text and note 1 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(4) CREATION UNDER DOCTRINE OF PRESCRIPTION /(iv) Prescription under the Prescription Act 1832/100. Enjoyment for twenty years or forty years.

100. Enjoyment for twenty years or forty years.

No claim which may lawfully be made at common law, by custom, prescription or grant to any way¹ or other easement² or to any watercourse or the use of any water, to be enjoyed or derived upon, over or from any land or water of the Crown³, or being the property of any ecclesiastical or lay person or body corporate, when the way or other matter has been actually enjoyed by any person claiming right thereto⁴ without interruption for the full period of 20 years, is to be defeated or destroyed by showing only that the way or other matter was first enjoyed at any time prior to that period of 20 years; but nevertheless the claim may be defeated in any other way by which it was liable to be defeated before 1 August 1832⁵; and where the way or other matter has been so enjoyed for the full period of 40 years the right to it is to be deemed absolute and indefeasible unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing⁶.

This provision applies to easements of every kind⁷ except light⁸. Thus, a right of support by buildings⁹ or land¹⁰, a right to pollute water¹¹ and a right to divert water¹² can all be claimed under it.

No presumption is to be made under this provision in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time than the period mentioned and applicable to the case and to the nature of the claim¹³. This means that no presumption or inference in support of the claim is to be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but where there are other circumstances in addition the provision does not take away from the fact of enjoyment for a shorter period its natural weight as evidence so as to preclude the court from taking it, along with other circumstances, into consideration as evidence of a grant¹⁴.

1 See *A-G v Esher Linoleum Co Ltd* [1901] 2 Ch 647 at 650, where Buckley J pointed out that a public way cannot be acquired under the Act.

2 Ie any other easement other than the easement of light: see the text and note 8 infra.

3 Ie of the Sovereign or being parcel of the Duchy of Lancaster or the Duchy of Cornwall: Prescription Act 1832 s 2.

4 As to these words see PARA 104 post.

5 Ie the date when the Prescription Act 1832 was passed.

6 Ibid s 2 (amended by the Statute Law Revision (No 2) Act 1888; the Statute Law Revision Act 1890). A cessation in the enjoyment of a use during the required 20-year period while seeking a negotiated resolution to a dispute over the use will not be considered to be an interruption to the enjoyment of the use: *Smith v Brudenell-Bruce* [2002] 2 P & CR 51, [2001] All ER (D) 03 (Jul) (para 21) (where, however, the court held that there was no user as of right for the purposes of the Prescription Act 1832 on the facts).

7 *Simpson v Godmanchester Corpn* [1897] AC 696 at 709, HL, per Lord Davey; *Dalton v Angus* (1881) 6 App Cas 740 at 798, HL, per Lord Selborne LC. See contra *Webb v Bird* (1861) 10 CBNS 268 at 283 per Erle CJ; affd (1862) 13 CBNS 841.

8 *Perry v Eames* [1891] 1 Ch 658 at 665 per Chitty J; *Wheaton v Maple & Co* [1893] 3 Ch 48, CA.

9 *Lemaitre v Davis* (1881) 19 ChD 281. See also *Selby v Whitbread & Co* [1917] 1 KB 736 at 751 per McCardie J.

10 *Dalton v Angus* (1881) 6 App Cas 740, HL.

11 *Wright v Williams* (1836) 1 M & W 77; *Carlyon v Lovering* (1857) 1 H & N 784 at 797.

12 *Mason v Shrewsbury and Hereford Rly Co* (1871) LR 6 QB 578.

13 Prescription Act 1832 s 6 (amended by the Statute Law Revision (No 2) Act 1888). See *Carr v Foster* (1842) 3 QB 581; *Lawson v Langley* (1836) 4 Ad & El 890.

14 *Hanmer v Chance* (1865) 4 De GJ & Sm 626 at 631 per Lord Westbury LC. For instances of such circumstances see *Rochdale Canal Co v King* (1851) 2 Sim NS 78; *Bankart v Tennant* (1870) LR 10 Eq 141. See also *Smith v Brudenell-Bruce* [2002] 2 P & CR 51, [2001] All ER (D) 03 (Jul) cited in note 6 supra.

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101. Persons under disability.

Any time during which any person otherwise capable of resisting any claim to an easement is under disability¹ or is a tenant for life, or during which any claim² is pending which has been diligently prosecuted, is excluded from the periods of 20 and 40 years except where the claim is declared by the Prescription Act 1832 to be absolute and indefeasible³. The practical effect is that the period of disability is excluded from the 20 years' period required for acquisition of a prima facie right to an easement other than light⁴, but neither from the 40 year period, nor from the 20 year period in the case of an easement of light.

1 He is a minor or a person who, by reason of mental disease, is incapable of managing his property and affairs. The Prescription Act 1832 s 7 referred to 'an infant, idiot, non compos mentis, feme covert'. It has had no application to married women since 1882: *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268 at 280 per Eve J.

2 The statutory wording is 'action'; but an 'action' is now known as a 'claim': see CIVIL PROCEDURE.

3 Prescription Act 1832 s 7. See *Wright v Williams* (1836) 1 M & W 77; *Hale v Oldroyd* (1845) 14 M & W 789; *Roberts and Lovell v James* (1903) 89 LT 282, CA. It is thought that the constitution by the Settled Land Act 1925 and the Law of Property Act 1925 of a legal estate owner where a minor or tenant for life is entitled in equity to the servient tenement has not impliedly affected the Prescription Act 1832 s 7 in those cases: see the Law of Property Act 1925 s 12.

4 He under the Prescription Act 1832 s 3 (as amended): see PARA 237 post.

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102. Reversioners.

Where the servient tenement¹ has been held for any term of life or years exceeding three years, the time of enjoyment of the easement during the continuance of that term is to be excluded in the computation of the 40 years' period, in case the claim shall within three years next after the end or sooner determination of that term be resisted by any person entitled to any reversion expectant on its determination². This provision does not apply to a claim based on the 20 years' period.

¹ le any land or water upon, over or from which any such way or other [convenient] watercourse or use of water has been or is to be enjoyed or derived: Prescription Act 1832 s 8 (amended by the Statute Law Revision (No 2) Act 1888). The word 'convenient' appears to be the result of a clerical error and should read 'easement': *Wright v Williams* (1836) 1 M & W 77; *Laird v Briggs* (1881) 19 ChD 22, CA; *Symons v Leaker* (1885) 15 QBD 629. If it is not to be read in this sense it appears to be restricted to rights of way and easements relating to watercourses and use of water.

² Prescription Act 1832 s 8 (as amended: see note 1 supra). See *Wright v Williams* (1836) 1 M & W 77; *Onley v Gardiner* (1838) 4 M & W 496; *Laird v Briggs* (1880) 16 ChD 440 (on appeal (1881) 19 ChD 22, CA); *Bright v Walker* (1834) 1 Cr M & R 211 at 220; *Palk v Shinner* (1852) 18 QB 568.

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103. Remainderman.

Where the servient tenement has been vested in a tenant for life with remainder in fee simple the time during which the tenancy for life was subsisting cannot be deducted from the 40 years' period, as the remainderman is not a person entitled to any 'reversion expectant' on the term¹ within the meaning of the Prescription Act 1832².

1 See the Prescription Act 1832 s 8 (as amended); and PARA 102 ante.

2 *Symons v Leaker* (1885) 15 QBD 629.

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104. Enjoyment must be as of right.

Except in the case of light¹, user or enjoyment of the right to an easement when claimed under the Prescription Act 1832 must be user or enjoyment 'as of right'². The words in the Act 'claiming right thereto'³ have the same meaning as the words 'as of right' used elsewhere in the Act⁴, and as used in cases of prescription at common law⁵. Therefore, if an easement or alleged easement is shown to have been enjoyed not openly and in the manner that a person rightfully entitled would have used it, but by stealth, or if the person claiming the right has occasionally asked the permission of the owner of the servient or quasi-servient tenement, no title is acquired under the Act because the enjoyment has not been 'as of right'⁶. User at the will and pleasure of the owner of the servient tenement is not such user as the Act requires⁷.

1 As to prescriptive claims to the easement of light under the Prescription Act 1832 see PARA 236 post.

2 *Bright v Walker* (1834) 1 Cr M & R 211; *Tickle v Brown* (1836) 4 Ad & El 369 at 382; *Onley v Gardiner* (1838) 4 M & W 496; *Sturges v Bridgman* (1879) 11 ChD 852 at 863, CA; *Kilgour v Gaddes* [1904] 1 KB 457, CA; *Timmons v Hewitt* (1888) 22 LR Ir 627, CA. See also PARA 85 ante.

3 See the Prescription Act 1832 s 2 (as amended); and PARA 100 ante. The phrase also appears in s 1 (as amended): see PARAS 274, 279 post.

4 See *ibid* s 5 (amended by the Statute Law Revision (No 2) Act 1888).

5 *Tickle v Brown* (1836) 4 Ad & El 369 at 382 per Lord Denman CJ. 'As of right' does not mean rightful apart from the Prescription Act 1832: *Gardner v Hodgson's Kingston Breweries Co* [1900] 1 Ch 592 at 596; on appeal [1903] AC 229, HL.

6 *Bright v Walker* (1834) 1 Cr M & R 211; *Tickle v Brown* (1836) 4 Ad & El 369; see also *Onley v Gardiner* (1838) 4 M & W 496. User by force is not user 'as of right'; where the person claiming the right knows that there are objections to his claim, user is user by force: *Newham v Willison* (1987) 56 P & CR 8, CA; *Smith v Brudenell-Bruce* [2002] 2 P & CR 51, [2001] All ER (D) 03 (Jul).

7 *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229 at 231, HL, per Lord Halsbury LC; *Onley v Gardiner* (1838) 4 M & W 496; and see *Bankart v Tennant* (1870) LR 10 Eq 141. See also *Lyell v Lord Hothfield* [1914] 3 KB 911 (claim to pasture rights); *Healey v Hawkins* [1968] 3 All ER 836, [1968] 1 WLR 1967 (user permissive in origin, subsequently changed character and became user as of right); *Jones v Price and Morgan* (1992) 64 P & CR 404, [1992] EGCS 4, CA (user which continues on a common understanding that it is and continues to be permissive is not user as of right).

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105. User during unity of possession.

There is no enjoyment as of right under the Prescription Act 1832 where during the whole of the period the dominant and servient tenements have been in the possession of one owner, because the acts done by him upon the servient tenement are referable to his possession of that tenement¹; nor is there enjoyment as of right when during part of the period there has been unity of possession². No easement which can be claimed under the Act³ can be acquired by a tenant of the quasi-dominant tenement against his own landlord or another tenant of his own landlord⁴ for, in the sight of the law, the tenant's occupation is that of his landlord, and when the tenant goes on to that landlord's adjoining land he cannot be said to do so as claiming a right in respect of the supposed dominant tenement on behalf of the freeholder, the supposed servient tenement being the freeholder's own land⁵.

1 *Bright v Walker* (1834) 1 Cr M & R 211 at 219; *Onley v Gardiner* (1838) 4 M & W 496.

2 *Bright v Walker* (1834) 1 Cr M & R 211; *Damper v Bassett* [1901] 2 Ch 350; *Onley v Gardiner* (1838) 4 M & W 496.

3 Ie under the Prescription Act 1832 s 2 (as amended): see PARA 100 ante.

4 *Kilgour v Gaddes* [1904] 1 KB 457, CA; *Derry v Sanders* [1919] 1 KB 223 at 239, CA. This rule also applies to the acquisition of an easement under the doctrine of lost modern grant: *Simmons v Dobson* [1991] 4 All ER 25, [1991] 1 WLR 720, CA; and see PARA 97 ante.

5 *Gayford v Moffatt* (1868) 4 Ch App 133; *Kilgour v Gaddes* [1904] 1 KB 457 at 467, CA.

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106. Nature of user.

With regard to all easements except the easement of light¹, the user contemplated by the Prescription Act 1832 is user sufficient to indicate, during the whole of the statutory period (whether or not acts of user be proved in each year), to a reasonable person in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted, if that right is not to be recognised, and if resistance to it is intended²; and no user can be sufficient which does not raise a reasonable inference of continuous enjoyment³.

The Act has not altered the enjoyment or user by which easements are acquired, and since acquiescence on the part of the servient owner lies at the root of prescription, no person can be presumed to acquiesce in an enjoyment which he cannot prevent. Enjoyment which cannot be physically interrupted and is not actionable is not user as of right under the Act⁴.

User which consists of acts attributable to a claim to a title in the soil is not such user as will support a claim to an easement under the Act⁵.

1 As to prescriptive claims to the easement of light under the statute see PARA 237 post.

2 *Hollins v Verney* (1884) 13 QBD 304 at 315, CA, per Lindley LJ.

3 *Hollins v Verney* (1884) 13 QBD 304, CA (right of way claimed to remove timber cut at periods occurring at intervals of several years). See further *Davis v Whitby* [1974] Ch 186, [1974] 1 All ER 806, CA; applying *Payne v Shelden* (1834) 1 Mood & R 382 at 383 per Patteson J; *Goldsmith v Burrow Construction Co* (1987) Times, 31 July, CA (where user was periodically blocked by a locked gate no easement could arise since the user was not, on the facts, capable of amounting to an easement; there was no need to consider whether there was an interruption within the Prescription Act 1832).

4 See PARAS 77, 90 ante; *Sturges v Bridgman* (1879) 11 ChD 852, CA; *Bryant v Lefever* (1879) 4 CPD 172, CA; *Winship v Hudspeth* (1854) 10 Exch 5; *Sander v Manley and Rogers* [1878] WN 181. For the distinction between positive and negative easements as regards interruption of adverse enjoyment see PARA 27 ante.

5 *Lyell v Lord Hothfield* [1914] 3 KB 911.

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107. Relation of user to civil proceedings.

The periods mentioned in the Prescription Act 1832 are periods next before some civil proceedings¹ in which the claim or matter to which the period relates is brought into question². Consequently, although the Act³ apparently renders the right indefeasible after 20 or 40 years' user as the case may be, the combined operation of the statutory provisions⁴ renders it necessary for a person seeking to establish a prescriptive claim under the Act to prove uninterrupted enjoyment for a period of 20 or 40 years immediately previous to and terminating in some claim or suit in which the right is called into question⁵.

1 The statutory wording is 'some suit or action' but an 'action' is now referred to as a 'claim': see CIVIL PROCEDURE. The phrase 'civil proceedings' has been used in the text instead of 'claim' in order to avoid confusion with 'claim' in the context of 'the claim or matter to which the period relates'.

2 Prescription Act 1832 s 4 (amended by the Statute Law Revision (No 2) Act 1888). This paragraph in the previous edition is quoted verbatim in *Wilson's Brewery Ltd v West Yorkshire Metropolitan County Council* (1977) 34 P & CR 224, Lands Tribunal, but unfortunately 'necessary' appears as 'unnecessary'. See also *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 189, HL, per Lord Macnaghten.

3 See the Prescription Act 1832 s 2 (as amended); and PARA 100 ante.

4 *Id* ss 2, 3, 4 (as amended).

5 *Hyman v Van den Bergh* [1908] 1 Ch 167, CA; *Parker v Mitchell* (1840) 11 Ad & El 788; *Wright v Williams* (1836) 1 M & W 77; *Richards v Fry* (1838) 7 Ad & El 698; *Ward v Robins* (1846) 15 M & W 237 at 242; *Reilly v Orange* [1955] 2 All ER 369, CA; *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA. The period is not necessarily the period before the pending proceedings; it may be the period before any proceedings in which the right was brought into question: *Cooper v Hubbuck* (1862) 12 CBNS 456.

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108. Cessation of user.

In cases where enjoyment as of right is necessary¹, a cessation of user which excludes an inference of actual enjoyment as of right for the full statutory period will be fatal at whatever portion of the period the cessation occurs²; and, on the other hand, a cessation of user which does not exclude that inference is not fatal, even though it occurs at the beginning or the end of the period. The only difference, as regards the date in the statutory period at which a cessation of the enjoyment occurs, is that if the non-user occurs at the end of the period there can be no subsequent user to explain it, and the inference of actual enjoyment for the full period next before bringing a claim is more difficult to draw than in other cases³.

1 In all cases except the easement of light under the Prescription Act 1832 s 3 (as amended).

2 *Tehidy Minerals Ltd v Norman* [1971] 1 QB 528, [1971] 2 All ER 475, CA.

3 *Hollins v Verney* (1884) 13 QBD 304 at 314, CA, per Lindley LJ. Thus in *Parker v Mitchell* (1840) 11 Ad & El 788 and *Lowe v Carpenter* (1851) 6 Exch 825 unexplained non-user at the end of the period was fatal to the prescriptive claim.

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109. Interruption.

No act or other matter is deemed to be an interruption within the meaning of the Prescription Act 1832 unless submitted to or acquiesced in for one year after the party interrupted has notice of the interruption, and of the person making it or authorising it to be made¹.

An interruption for one year after the party interrupted has notice of the interruption is fatal to a prescriptive claim under the Act, but an interruption for less than a year is not, whether it occurs at the commencement or end or at any part of the statutory period², and, consequently, where an easement has been enjoyed without interruption for more than 19 years, interruption before the completion of the period of 20 years will not prevent title to the easement being acquired under the Act by 20 years' enjoyment³, if proceedings claiming the right are begun within a year after notice of the interruption⁴. If the interruption is of a permanent character, the onus is on the party claiming the easement to prove that at the time he commenced proceedings the interruption had lasted for less than a year; if the interruption has in fact lasted for a year or more, he must prove that he did not acquiesce in it⁵. The effect, however, of an interruption which does not amount to a statutory interruption may be to qualify the nature of the easement claimed⁶.

The beginning of a claim for a declaration that an easement has been determined is not an interruption⁷.

It seems that the mere physical existence of an obstruction is not sufficient notice of interruption within the Act, because it is not notice of the person making the obstruction⁸. A promise given within the year to remove an obstruction may prevent the interruption of the easement⁹. Acquiescence in an interruption is a question of fact¹⁰ or, it may be, a state of mind evidenced by the conduct of the parties¹¹, but in order to disprove acquiescence it is not necessary to take proceedings or remove the obstruction¹².

1 Prescription Act 1832 s 4 (amended by the Statute Law Revision (No 2) Act 1888). As to public rights of way see *Fairey v Southampton County Council* [1956] 2 QB 439, [1956] 2 All ER 843, CA; and HIGHWAYS, STREETS AND BRIDGES.

2 *Flight v Thomas* (1841) 8 Cl & Fin 231, HL; *Hollins v Verney* (1884) 13 QBD 304, CA.

3 *Reilly v Orange* [1955] 2 QB 112, [1955] 2 All ER 369, CA. It seems that an inchoate easement of light can no longer be set up on the basis of 19 years and one day of actual enjoyment pending a claim brought to assert a substantive easement at the expiration of 20 years' enjoyment 'without interruption'. The access of light may be notionally obstructed by registration of a notice as a local land charge: see PARAS 244-245 post.

4 *Flight v Thomas* (1841) 8 Cl & Fin 231, HL.

5 *Presland v Bingham* (1889) 41 ChD 268; *Dance v Triplow* (1991) 64 P & CR 1, [1992] 1 EGLR 190, CA.

6 *Rolle v Whyte* (1868) LR 3 QB 286 at 302.

7 *Reilly v Orange* [1955] 2 QB 112, [1955] 2 All ER 369, CA.

8 *Seddon v Bank of Bolton* (1882) 19 ChD 462.

9 *Gale v Abbot* (1862) 10 WR 748.

10 *Bennison v Cartwright* (1864) 5 B & S 1.

11 *Davies v Du Paver* [1953] 1 QB 184 at 203, [1952] 2 All ER 991 at 999, CA; *Dance v Triplow* (1991) 64 P & CR 1, [1992] 1 EGLR 190, CA.

12 *Glover v Coleman* (1874) LR 10 CP 108; *Dance v Triplow* (1991) 64 P & CR 1, [1992] 1 EGLR 190, CA.

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110. Enjoyment for less than statutory period.

Until the full expiration of 20 years the inchoate right is not an interest in land or an easement known to the law¹, and until that period has expired the court will not interfere to protect it².

1 *Greenhalgh v Brindley* [1901] 2 Ch 324 at 328.

2 *Lord Battersea v City of London Sewers Comrs* [1895] 2 Ch 708; *Reilly v Orange* [1955] 2 QB 112, [1955] 2 All ER 369, CA.

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111. Discontinuance of exercise of right.

A mere discontinuance of the exercise of the alleged right at the will of the owner of the dominant tenement is not necessarily an interruption which will defeat a prescriptive claim under the Prescription Act 1832¹. There must be an adverse act indicating that the right is disputed², and an actual discontinuance of the enjoyment by reason of an obstruction which is submitted to or acquiesced in for a year³. A discontinuance of the enjoyment due to natural causes and not to any act of the parties does not amount to an interruption⁴.

1 *Carr v Foster* (1842) 3 QB 581; and see *Dare v Heathcote* (1856) 25 LJ Ex 245.

2 *Smith v Baxter* [1900] 2 Ch 138.

3 *Plasterers' Co v Parish Clerks' Co* (1851) 6 Exch 630 at 635 per Lord Campbell CJ (claim to light under the Prescription Act 1832 s 3 (as amended), where enjoyment as of right is immaterial).

4 *Hall v Swift* (1838) 4 Bing NC 381.

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(5) ACCESS ORDERS UNDER THE

112. Application to the court for an access order.

A person who, for the purpose of carrying out works¹ to any land² (the 'dominant land'), desires to enter³ upon any adjoining or adjacent land (the 'servient land'), and who needs, but does not have, the consent of some other person to that entry, may make an application to the court for an order under the Access to Neighbouring Land Act 1992 ('an access order') against that other person⁴.

The High Court and the county courts both have jurisdiction under the 1992 Act⁵ but applications for an access order must be commenced in a county court⁶. The claimant must use the Part 8 procedure⁷ and the claim form must set out:

- 15 (1) details of the dominant and servient land involved and whether the dominant land includes or consists of residential property;
- 16 (2) the work required;
- 17 (3) why entry to the servient land is required with plans, if applicable;
- 18 (4) the names and addresses of the persons who will carry out the work;
- 19 (5) the proposed date when the work will be carried out; and
- 20 (6) what, if any, provision has been made by way of insurance in the event of possible injury to persons or damage to property arising out of the proposed work⁸.

The owner and occupier of the servient land must be defendants to the claim⁹. Rules of court may:

- 21 (a) provide a procedure which may be followed where the applicant¹⁰ does not know, and cannot reasonably ascertain, the name of any person whom he desires to make respondent to the application; and
- 22 (b) make provision enabling such an applicant to make such a person respondent by description instead of by name¹¹.

An application for an access order is regarded as a pending land action¹² for the purposes of the Land Charges Act 1972 and the Land Registration Act 2002¹³.

Any agreement, whenever made, is void if and to the extent that it would, apart from this provision, prevent a person from applying for an access order or restrict his right to do so¹⁴.

1 For the meaning of 'works' and 'the carrying out of works' for these purposes see PARA 114 the text and notes 6-7 post.

2 For these purposes, 'land' does not include a highway: Access to Neighbouring Land Act 1992 s 8(3). It does, however, include a party wall: *Dean v Walker* (1996) 73 P & CR 366, CA. As to party walls see further PARAS 185, 191 et seq post.

3 Any reference in the Access to Neighbouring Land Act 1992 to an 'entry' upon any servient land includes a reference to the doing on that land of anything necessary for carrying out the works to the dominant land which are reasonably necessary for its preservation; and 'enter' is to be construed accordingly: s 8(1). The 1992 Act applies in relation to any obstruction of, or other interference with, a right over, or interest in, any land as it

applies in relation to an entry upon that land; and 'enter' and 'entry' are to be construed accordingly: s 8(2). 'The dominant land' and 'the servient land' respectively have the meanings given by s 1(1) (see the text and note 2 supra, note 4 infra), but subject, in the case of servient land, to s 2(1) (see PARA 115 post): s 8(3).

4 Ibid ss 1(1), 8(3). For a discussion as to the relative merits of including, in an estate management scheme under the Leasehold Reform, Housing and Urban Development Act 1993 s 70 (as amended) (see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1734 et seq), a provision for access to premises for the purpose of maintenance of trees or executing repairs to a neighbouring property, or of relying on the statutory right to apply to the court under the Access to Neighbouring Land Act 1992, see *Re Grosvenor Estate (Mayfair) London's Application* [1995] 38 EG 142, [1995] 2 EGLR 202, Leasehold Valuation Tribunal.

5 Access to Neighbouring Land Act 1992 s 7(1).

6 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 6A (added by the Access to Neighbouring Land Act 1992 s 7(2)). The amendment by s 7(2) of provisions contained in an order is not to be taken to have prejudiced any power to make further orders revoking or amending those provisions: s 7(3). A practice direction may set out special provisions with regard to claims under the Access to Neighbouring Land Act 1992: CPR 56.4(c). See the text and notes 7-9 infra.

7 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 11.1. As to the Part 8 procedure (ie the alternative procedure for commencing a claim under CPR Pt 8 instead of the normal procedure under CPR Pt 7) see CIVIL PROCEDURE vol 11 (2009) PARAS 127-137.

8 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 11.2.

9 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 11.3.

10 For these purposes, 'applicant' includes a person who proposes to make an application for an access order: Access to Neighbouring Land Act 1992 s 4(3). For the meaning of 'applicant' generally see PARA 115 note 7 post.

11 Ibid s 4(3). A practice direction may set out circumstances in which a claim form may be issued under CPR Pt 8 without naming a defendant: CPR 8.2A(1). The practice direction may set out those cases in which an application for permission must be made by application notice before the claim form is issued: CPR 8.2A(2). The application notice for permission need not be served on any other person; and must be accompanied by a copy of the claim form that the applicant proposes to issue: CPR 8.2A(3). Where the court gives permission it will give directions about the future management of the claim: CPR 8.2A(4). No such specific provision appears to have been made, in relation to applications for access orders, by CPR Pt 56 or by *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56.

12 An 'action' is now generally referred to as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

13 Access to Neighbouring Land Act 1992 s 5(6) (amended by the Land Registration Act 2002 s 133, Sch 11 para 26(1), (5)).

14 Access to Neighbouring Land Act 1992 s 4(4).

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113. Court's power to make order.

On an application¹, the court² may make³ an access order⁴ if, and only if, it is satisfied:

- 23 (1) that the works⁵ are reasonably necessary⁶ for the preservation of the whole or any part of the dominant land⁷; and
- 24 (2) that they cannot be carried out, or would be substantially more difficult to carry out, without entry⁸ upon the servient land⁹.

The court may not, however, make an access order in any case where it is satisfied that, were it to make such an order:

- 25 (a) the respondent¹⁰ or any other person would suffer interference with, or disturbance of, his use or enjoyment of the servient land; or
- 26 (b) the respondent, or any other person, whether of full age or capacity or not, in occupation of the whole or any part of the servient land, would suffer hardship,

to such a degree by reason of the entry, notwithstanding any requirement of the Access to Neighbouring Land Act 1992 or any term or condition¹¹ that may be imposed under it, that it would be unreasonable to make the order¹².

1 Ie an application under the Access to Neighbouring Land Act 1992 s 1: see PARA 112 ante; the text and notes 2-12 infra; and PARA 114 post.

2 'The court' means the High Court or a county court: *ibid* s 8(2).

3 Ie subject to *ibid* s 1(3): see the text and notes 10-12 infra.

4 'Access order' has the meaning given by *ibid* s 1(1) (see PARA 112 ante): s 8(3).

5 For the meaning of 'works' and 'the carrying out of works' for these purposes see PARA 114 the text and notes 6-7 post.

6 As to when works are reasonably necessary for these purposes see PARA 114 post.

7 For the meaning of 'the dominant land' see PARA 112 note 3 ante; and for the meaning of 'land' see PARA 112 note 2 ante.

8 For the meaning of 'entry' see PARA 112 note 3 ante.

9 Access to Neighbouring Land Act 1992 s 1(2). For the meaning of 'the servient land' see PARA 112 note 3 ante.

10 Subject to *ibid* s 4 (as amended) (see PARA 118 post), 'the respondent' means the respondent, or any of the respondents, to an application for an access order: s 8(3).

11 As to the terms and conditions of an access order see PARA 115 post.

12 Access to Neighbouring Land Act 1992 s 1(3).

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114. Works reasonably necessary for the preservation of the dominant land.

Where the court¹ is satisfied on an application² that it is reasonably necessary to carry out any basic preservation works to the dominant land³, those works are to be taken for the purposes of the Access to Neighbouring Land Act 1992 to be reasonably necessary for the preservation of the land; and for these purposes 'basic preservation works' means any of the following, that is to say:

- 27 (1) the maintenance, repair or renewal of any part of a building or other structure comprised in, or situate on, the dominant land;
- 28 (2) the clearance, repair or renewal of any drain, sewer, pipe or cable so comprised or situate;
- 29 (3) the treatment, cutting back, felling, removal or replacement of any hedge, tree, shrub or other growing thing which is so comprised and which is, or is in danger of becoming, damaged, diseased, dangerous, insecurely rooted or dead;
- 30 (4) the filling in, or clearance, of any ditch so comprised;

but this provision is without prejudice to the generality of the works which may, apart from it, be regarded by the court as reasonably necessary for the preservation of any land⁴.

If the court considers it fair and reasonable in all the circumstances of the case, works may be regarded for the statutory purposes as being reasonably necessary for the preservation of any land or, for the purposes set out above, as being basic preservation works which it is reasonably necessary to carry out to any land, notwithstanding that the works incidentally involve:

- 31 (a) the making of some alteration, adjustment or improvement to the land; or
- 32 (b) the demolition of the whole or any part of a building or structure comprised in or situate upon the land⁵.

Where any works are reasonably necessary for the preservation of the whole or any part of the dominant land, the doing to the dominant land of anything which is requisite for, incidental to, or consequential on, the carrying out of those works is to be treated for the statutory purposes as the carrying out of works which are reasonably necessary for the preservation of that land⁶. Without prejudice to the generality of this provision, if it is reasonably necessary for a person to inspect the dominant land:

- 33 (i) for the purpose of ascertaining whether any works may be reasonably necessary for the preservation of the whole or any part of that land;
- 34 (ii) for the purpose of making any map or plan, or ascertaining the course of any drain, sewer, pipe or cable, in preparation for, or otherwise in connection with, the carrying out of works which are so reasonably necessary; or
- 35 (iii) otherwise in connection with the carrying out of any such works,

the making of such an inspection is to be taken for the statutory purposes to be the carrying out to the dominant land of works which are reasonably necessary for the preservation of that land⁷.

1 For the meaning of 'the court' see PARA 113 note 2 ante.

2 In an application under the Access to Neighbouring Land Act 1992 s 1: see the text and notes 3-7 infra; and PARAS 112-113 ante.

3 For the meaning of 'the dominant land' see PARA 112 note 3 ante; and for the meaning of 'land' see PARA 112 note 2 ante.

4 Access to Neighbouring Land Act 1992 s 1(4).

5 Ibid s 1(5).

6 Ibid s 1(6). References in the Access to Neighbouring Land Act 1992 to works, or to the carrying out of works, are to be construed accordingly: s 1(6).

7 Ibid s 1(7). References in the Access to Neighbouring Land Act 1992 to works, or to the carrying out of works, are to be construed accordingly: s 1(7).

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115. Terms and conditions of access orders.

An access order¹ must specify:

- 36 (1) the works² to the dominant land³ that may be carried out by entering⁴ upon the servient land⁵ in pursuance of the order;
- 37 (2) the particular area of servient land that may be entered upon by virtue of the order for the purpose of carrying out those works to the dominant land; and
- 38 (3) the date on which, or the period during which, the land may be so entered upon⁶.

An access order may impose upon the applicant⁷ or the respondent⁸ such terms and conditions as appear to the court⁹ to be reasonably necessary for the purpose of avoiding or restricting:

- 39 (a) any loss, damage, or injury which might otherwise be caused to the respondent or any other person by reason of the entry authorised by the order; or
- 40 (b) any inconvenience or loss of privacy that might otherwise be so caused to the respondent or any other person¹⁰.

An access order may also impose terms and conditions:

- 41 (i) requiring the applicant to pay, or to secure that such person connected with him as may be specified in the order pays, compensation for any loss, damage or injury, or any substantial loss of privacy or other substantial inconvenience, which will, or might, be caused to the respondent or any other person by reason of the entry authorised by the order;
- 42 (ii) requiring the applicant to secure that he, or such person connected with him¹¹ as may be specified in the order, is insured against any such risks as may be so specified; or
- 43 (iii) requiring such a record to be made of the condition of the servient land, or of such part of it as may be so specified, as the court may consider expedient with a view to facilitating the determination of any question that may arise concerning damage to that land¹².

An access order may include provision requiring the applicant to pay the respondent such sum by way of consideration for the privilege of entering the servient land in pursuance of the order as appears to the court to be fair and reasonable having regard to all the circumstances of the case, including, in particular:

- 44 (A) the likely financial advantage of the order¹³ to the applicant and any persons connected with him; and
- 45 (B) the degree of inconvenience likely to be caused to the respondent or any other person by the entry;

but no payment may be ordered under this provision if and to the extent that the works which the applicant desires to carry out by means of the entry are works to residential land¹⁴.

1 For the meaning of 'access order' see PARAS 112, 113 note 4 ante.

2 For the meaning of 'works' and 'the carrying out of works' for these purposes see PARA 114 the text and notes 6-7 ante.

3 For the meaning of 'the dominant land' see PARA 112 note 3 ante; and for the meaning of 'land' see PARA 112 note 2 ante.

4 For the meaning of 'enter' see PARA 112 note 3 ante.

5 For the meaning of 'the servient land' see PARA 112 note 3 ante; but see note 6 infra.

6 Access to Neighbouring Land Act 1992 s 2(1). In ss 2(2)-8 (see the text and notes 7-14 infra; and PARA 116 et seq post), any reference to the servient land is a reference to the area specified in the order in pursuance of s 2(1)(b) (see head (2) in the text): s 2(1).

7 'Applicant' means a person making an application for an access order: *ibid* s 8(3).

8 For the meaning of 'the respondent' see PARA 113 note 10 ante.

9 For the meaning of 'the court' see PARA 113 note 2 ante.

10 Access to Neighbouring Land Act 1992 s 2(2). Without prejudice to the generality of s 2(2), the terms and conditions which may be imposed thereunder include provisions with respect to: (1) the manner in which the specified works are to be carried out; (2) the days on which, and the hours between which, the work involved may be executed; (3) the persons who may undertake the carrying out of the specified works or enter upon the servient land under or by virtue of the order; (4) the taking of any such precautions by the applicant as may be specified in the order: s 2(3). 'The specified works' means the works specified in the access order in pursuance of s 2(1)(a) (see head (1) in the text): s 8(3).

11 The persons who are to be regarded for the purposes of *ibid* s 2 (see the text and notes 1-10 supra, 12-14 infra) as 'connected with' the applicant are: (1) the owner of any estate or interest in, or right over, the whole or any part of the dominant land; (2) the occupier of the whole or any part of the dominant land; and (3) any person whom the applicant may authorise under s 3(7) (see PARA 117 note 4 post) to exercise the power of entry conferred by the access order: s 2(8).

12 *Ibid* s 2(4).

13 For these purposes, the likely financial advantage of an access order to the applicant and any persons connected with him is in all cases to be taken to be a sum of money equal to the greater of the following amounts, that is to say: (1) the amount (if any) by which so much of any likely increase in the value of any land (a) which consists of or includes the dominant land, and (b) which is owned or occupied by the same person as the dominant land, as may reasonably be regarded as attributable to the carrying out of the specified works exceeds the likely cost of carrying out those works with the benefit of the access order; and (2) the difference (if it would have been possible to carry out the specified works without entering upon the servient land) between (a) the likely cost of carrying out those works without entering upon the servient land; and (b) the likely cost of carrying them out with the benefit of the access order: *ibid* s 2(6).

14 *Ibid* s 2(5). For these purposes, 'residential land' means so much of any land as consists of: (1) a dwelling or part of a dwelling; (2) a garden, yard, private garage or outbuilding which is used and enjoyed wholly or mainly with a dwelling; or (3) in the case of a building which includes one or more dwellings, any part of the building which is used and enjoyed wholly or mainly with those dwellings or any of them: s 2(7).

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116. Reimbursement of respondent's expenses and giving of security.

The court¹ may make provision:

- 46 (1) for the reimbursement by the applicant² of any expenses reasonably incurred by the respondent³ in connection with the application which are not otherwise recoverable as costs;
- 47 (2) for the giving of security by the applicant for any sum that might become payable to the respondent or any other person by virtue of the provisions set out in the previous paragraph⁴ or by virtue of the provisions regarding the effect⁵ of the access order⁶.

1 For the meaning of 'the court' see PARA 113 note 2 ante.

2 For the meaning of 'applicant' see PARA 115 note 7 ante.

3 For the meaning of 'the respondent' see PARA 113 note 10 ante.

4 Ie by virtue of the Access to Neighbouring Land Act 1992 s 2: see PARA 115 ante.

5 Ie by virtue of *ibid* s 3: see PARA 117 post.

6 *Ibid* s 2(9).

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117. Effect of access order.

An access order¹ requires the respondent², so far as he has power to do so, to permit the applicant³ or any of his associates⁴ to do anything which the applicant or associate is authorised or required to do under or by virtue of the order or these provisions⁵. Except as otherwise provided by or under the Access to Neighbouring Land Act 1992, an access order authorises the applicant or any of his associates, without the consent of the respondent:

- 48 (1) to enter⁶ upon the servient land⁷ for the purpose of carrying out the specified works⁸;
- 49 (2) to bring on to that land, leave there during the period permitted by the order and, before the end of that period, remove, such materials, plant and equipment as are reasonably necessary for the carrying out of those works; and
- 50 (3) to bring on to that land any waste arising from the carrying out of those works, if it is reasonably necessary to do so in the course of removing it from the dominant land⁹;

but nothing in the 1992 Act or in any access order authorises the applicant or any of his associates to leave anything in, on or over the servient land, otherwise than in discharge of their duty to make good that land, after their entry for the purpose of carrying out works to the dominant land ceases to be authorised under or by virtue of the order¹⁰.

Subject to the following provisions¹¹, an access order requires the applicant:

- 51 (a) to secure that any waste arising from the carrying out of the specified works is removed from the servient land forthwith;
- 52 (b) to secure that, before the entry ceases to be authorised under or by virtue of the order, the servient land is, so far as reasonably practicable, made good; and
- 53 (c) to indemnify the respondent against any damage which may be caused to the servient land or any goods by the applicant or any of his associates which would not have been so caused had the order not been made¹².

In making an access order, the court¹³ may vary or exclude, in whole or in part:

- 54 (i) any authorisation that would otherwise be conferred by head (2) or head (3) above; or
- 55 (ii) any requirement that would otherwise be imposed by heads (a) to (c) above¹⁴;

and without prejudice to the generality of this provision, if the court is satisfied that it is reasonably necessary for any such waste as may arise from the carrying out of the specified works to be left on the servient land for some period before removal, the access order may, in place of head (a) above, include provision authorising the waste to be left on that land for such period as may be permitted by the order and requiring the applicant to secure that the waste is removed before the end of that period¹⁵.

Where the applicant or any of his associates is authorised or required under or by virtue of an access order or the above provisions to enter, or do any other thing, upon the servient land, he

is not, as respects that access order, to be taken to be a trespasser from the beginning on account of his, or any other person's, subsequent conduct¹⁶.

1 For the meaning of 'access order' see PARAS 112, 113 note 4 ante.

2 For the meaning of 'the respondent' see PARA 113 note 10 ante.

3 For the meaning of 'applicant' see PARA 115 note 7 ante.

4 For these purposes, the applicant's 'associates' are such number of persons, whether or not servants or agents of his, whom he may reasonably authorise under this provision to exercise the power of entry conferred by the access order as may be reasonably necessary for carrying out the specified works: Access to Neighbouring Land Act 1992 s 3(7). See also note 8 infra.

5 Ibid s 3(1).

6 For the meaning of 'enter' see PARA 112 note 3 ante.

7 For the meaning of 'the servient land' see PARA 112 note 3 ante; and for the meaning of 'land' see PARA 112 note 2 ante.

8 For the meaning of 'works' and 'the carrying out of works' for these purposes see PARA 114 the text and notes 6-7 ante; and for the meaning of 'the specified works' see PARA 115 note 10 ante.

9 For the meaning of 'the dominant land' see PARA 112 note 3 ante.

10 Access to Neighbouring Land Act 1992 s 3(2).

11 Ie subject to ibid s 3(4), (5): see the text and notes 13-15 infra.

12 Ibid s 3(3).

13 For the meaning of 'the court' see PARA 113 note 2 ante.

14 Access to Neighbouring Land Act 1992 s 3(4).

15 Ibid s 3(5).

16 Ibid s 3(6). As to trespass to land see TORT vol 45(2) (Reissue) PARA 505 et seq.

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118. Persons bound by access order.

In addition to the respondent¹, an access order² is binding, subject to the provisions of the Land Charges Act 1972 and the Land Registration Act 2002³, on:

- 56 (1) any of his successors in title to the servient land⁴; and
- 57 (2) any person who has an estate or interest in, or right over, the whole or any part of the servient land which was created after the making of the order and who derives his title to that estate, interest or right under the respondent⁵.

If and to the extent that the court⁶ considers it just and equitable to allow him to do so, a person on whom an access order becomes binding by virtue of head (1) or head (2) above is entitled, as respects anything falling to be done after the order becomes binding on him, to enforce the order or any of its terms or conditions⁷ as if he were the respondent⁸.

1 For the meaning of 'the respondent' see PARA 113 note 10 ante.

2 For the meaning of 'access order' see PARAS 112, 113 note 4 ante. See also PARA 119 note 5 post.

3 The rights conferred on a person by or under an access order are not capable of falling within the Land Registration Act 2002 ss 11(4)(b), 12(4)(c), Sch 1 para 2 or ss 29(2)(a)(ii), 30(2)(a)(ii), Sch 3 para 2 (overriding status of interest of person in actual occupation: see LAND REGISTRATION): Access to Neighbouring Land Act 1992 s 5(5) (substituted by the Land Registration Act 2002 s 133, Sch 11 para 26(1), (4)). They require protection, in the case of unregistered land, by an entry registered under the Land Charges Act 1972 or, in the case of registered land, by a notice under the Land Registration Act 2002: see generally LAND CHARGES; LAND REGISTRATION.

4 For the meaning of 'the servient land' see PARA 112 note 3 ante; and for the meaning of 'land' see PARA 112 note 2 ante.

5 Access to Neighbouring Land Act 1992 s 4(1)(a), (b) (amended by the Land Registration Act 2002 s 133, Sch 11 para 26(1), (2)). References to the respondent are to be construed accordingly: Access to Neighbouring Land Act 1992 s 4(1).

6 For the meaning of 'the court' see PARA 113 note 2 ante.

7 As to the terms and conditions of an access order see PARA 115 ante.

8 Access to Neighbouring Land Act 1992 s 4(2). References to the respondent are to be construed accordingly: s 4(2).

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119. Variation of orders.

Where an access order¹ or an order under this provision has been made, the court² may, on the application of any party to the proceedings in which the order was made or of any other person on whom the order is binding³:

- 58 (1) discharge or vary the order or any of its terms or conditions⁴;
- 59 (2) suspend any of its terms or conditions; or
- 60 (3) revive any term or condition suspended under head (2) above⁵.

In any case where an access order is discharged under head (1) above, and the order has been protected by an entry registered under the Land Charges Act 1972 or by a notice under the Land Registration Act 2002⁶, the court may by order direct that the entry or notice is to be cancelled⁷.

1 For the meaning of 'access order' see PARAS 112, 113 note 4 ante.

2 For the meaning of 'the court' see PARA 113 note 2 ante.

3 As to persons on whom an access order is binding see PARA 118 ante.

4 As to the terms and conditions of an access order see PARA 115 ante.

5 Access to Neighbouring Land Act 1992 s 6(1). In the application of s 4(1), (2) (as amended) (see PARA 118 ante) in relation to an access order, any order under s 6(1) which relates to the access order is to be treated for those purposes as included in the access order: s 6(1).

6 See generally LAND CHARGES; LAND REGISTRATION.

7 Access to Neighbouring Land Act 1992 s 5(4) (amended by the Land Registration Act 2002 s 133, Sch 11 para 26(1), (3)).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/2. CREATION OF EASEMENTS/(5) ACCESS ORDERS UNDER THE ACCESS TO NEIGHBOURING LAND ACT 1992/120. Damages for breach.

120. Damages for breach.

If any person contravenes or fails to comply with any requirement, term or condition imposed upon him by or under the Access to Neighbouring Land Act 1992¹, the court² may, without prejudice to any other remedy available, make an order for the payment of damages by him to any other person affected by the contravention or failure who makes an application³ for relief under this provision⁴.

1 As to the requirements, terms or conditions which may be imposed see PARA 115 et seq ante.

2 For the meaning of 'the court' see PARA 113 note 2 ante.

3 As to the procedure for applications under the Access to Neighbouring Land Act 1992 see PARA 112 ante.

4 Ibid s 6(2).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/(1) IN GENERAL /121. How easements pass.

3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS

(1) IN GENERAL

121. How easements pass.

An easement may be passed by disposition inter vivos or by will. There is a wide distinction between the passing of an easement actually subsisting prior to the passing of land and the creation of an easement by the conveyance or other disposition of land¹. This distinction is not always apparent, because, for one reason, an easement cannot be passed apart from the dominant tenement², and for a further reason many easements which arise upon the conveyance or other disposition of the dominant tenement have, prior to the passing of that tenement, existed in the form of quasi-easements.

¹ As to easements created upon the disposition of land where a quasi-easement previously existed see PARA 63 et seq ante. See also *London and Blenheim Estates v Ladbroke Retail Parks*[1993] 4 All ER 157, [1994] 1 WLR 31, CA (grant of a right to nominate unspecified land as the dominant tenement of an easement was not in itself sufficient to create an interest in land binding successors in title to the servient tenement); applied in *Voice v Bell* (1993) 68 P & CR 441, [1993] NPC 105, CA.

² See *Rangeley v Midland Rly Co*(1868) 3 Ch App 306 at 311; *Hawkins v Rutter*[1892] 1 QB 668 at 671, DC; *Ackroyd v Smith* (1850) 10 CB 164 at 188.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/(1) IN GENERAL /122. Extinguishment of easements.

122. Extinguishment of easements.

An easement may be extinguished by release, express or implied, by unity of ownership, by destruction of either tenement, or by statute. There is a distinction in this respect between easements the title to which has been perfected by the existence of an actual grant or by the decision of a court of competent jurisdiction establishing the validity of a prescriptive claim, and easements the title to which remains imperfect but a right to which is capable of establishment under the doctrine of prescription¹. The term 'extinguishment' is often applied indiscriminately to both classes of easements, but in strictness it is applicable only to easements the title to which has been perfected.

There does not appear to be any case in which it has been necessary to decide, by analogy with the rule that an easement of necessity continues only during the subsistence of the necessity², whether an easement which accommodates the dominant tenement at the date of the grant, but which thereafter ceased to accommodate it, was extinguished by operation of law as no longer possessing one of the essential characteristics of an easement³, notwithstanding the continued existence of the dominant tenement⁴.

¹ See *Smith v Baxter* [1900] 2 Ch 138, where Stirling J pointed out the importance of this distinction. The title to easements is popularly regarded as complete upon the effluxion of the periods mentioned in the Prescription Act 1832. This, however, is not an accurate view: the title under the Act is not complete until called in question in 'some suit or action' (ie in some claim).

² See PARA 168 post.

³ See PARAS 8, 14 ante.

⁴ See *Huckvale v Aegean Hotels Ltd* (1989) 58 P & CR 163, CA; *Waveney District Council v Wholgemouth* (1985) Times, 11 July.

UPDATE

122 Extinguishment of easements

NOTE 4--See *Jones v Cleanthi* [2006] EWCA Civ 1712, [2007] 3 All ER 841 (no longer any practical possibility of easement benefiting flat).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/ (2) CONVEYANCE OF EASEMENTS/123. Disposition of easement; in general.

(2) CONVEYANCE OF EASEMENTS

123. Disposition of easement; in general.

Since an easement cannot be disposed of apart from the dominant tenement¹, it is clearly essential that the appropriate requirements for the disposition of the dominant tenement are complied with².

1 See PARA 121 ante.

2 See PARA 127 post; and SALE OF LAND vol 42 (Reissue) PARA 29 et seq.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/ (2) CONVEYANCE OF EASEMENTS/124. Easements passing without express words.

124. Easements passing without express words.

An easement existing appurtenant to the dominant tenement passes with that tenement without the necessity of express mention of the easement or the use of general words¹. It is usual, however, for a conveyance of land to which easements are appurtenant to contain in the parcels a description of the easements, but the general words which formerly were used are no longer commonly expressed, reliance being placed on the statutory implication of them, subject to the terms of the conveyance².

In the case of registered land, the powers of the registered proprietor³ in relation to a registered estate include power to make a disposition of any kind permitted by the general law in relation to an interest of that description⁴.

1 Co Litt 121b; Shep Touch 89.

2 See the Law of Property Act 1925 s 62; para 57 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236. As regards the contrary intention which will exclude s 62 see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236. As regards the construction of general words, if they are expressed, see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 235.

3 He or a person entitled to be registered as the proprietor: Land Registration Act 2002 s 24. As to registered land see PARAS 61-62 ante; and LAND REGISTRATION.

4 Ibid s 23(1)(a). For the position under the Land Registration Act 1925 (repealed) see ss 3(viii), (xxiv) (freehold), 23 (leasehold) (both repealed); the Land Registration Rules 1925, SR & O/1093, r 251 (revoked); and LAND REGISTRATION.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/ (2) CONVEYANCE OF EASEMENTS/125. Powers of limited owners.

125. Powers of limited owners.

A mortgagee, exercising his statutory power of sale, can sell and convey the mortgaged property or any part of it with or without a grant or reservation of easements¹, and a tenant for life or a statutory owner of settled land may sell or exchange any easement, right or privilege of any kind over or in relation to the settled land². Under the Trusts of Land and Appointment of Trustees Act 1996, for the purpose of exercising their functions as trustees, and subject to certain exceptions³, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner⁴.

1 Law of Property Act 1925 s 101(2)(ii). See *Born v Turner* [1900] 2 Ch 211 at 215 per Byrne J, a case of the creation of an easement by the conveyance of a mortgagee; and see further MORTGAGE.

2 See the Settled Land Act 1925 ss 19, 20, 23, 38 (as amended); and SETTLEMENTS. Note that, with very limited exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see s 2.

3 See *ibid* s 8; and TRUSTS vol 48 (2007 Reissue) PARAS 1035, 1046.

4 See *ibid* s 6 (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 1035.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/ (2) CONVEYANCE OF EASEMENTS/126. Unregistered land having common title with other land.

126. Unregistered land having common title with other land.

Where land having a common title with other land is disposed of to a purchaser (other than a lessee or a mortgagee) who does not hold or obtain possession of the documents forming the common title, the purchaser, notwithstanding any stipulation to the contrary, may require that a memorandum giving notice of any provision contained in the disposition to him restrictive of user of, or giving rights over, any other land comprised in the common title shall, where practicable, be written or indorsed on, or, where impracticable, be permanently annexed to, some one document selected by the purchaser but retained in the possession or power of the person who makes the disposition, and being or forming part of the common title¹.

The purchaser is thus given the option of having notice of the benefit of a restrictive covenant or of an easement created in his favour indorsed on the title to the burdened land. If he omits to take advantage of the enactment his title is not, by reason only of this provision, prejudiced². If he does take advantage of it, he will still not be protected if the case is one of an equitable, as contrasted with a legal, easement or is one of a restrictive covenant arising after 1925. In both those cases he ought for his protection to register a land charge³ if the title to the land is not registered⁴.

1 Law of Property Act 1925 s 200(1).

2 Ibid s 200(2).

3 Ibid s 200(4)(a), (c). This subsection enacts that nothing in s 200 'affects the obligation to register a land charge'. Neither the Law of Property Act 1925 nor the Land Charges Act 1972, however, obliges anyone to register a land charge under s 2(1), (4), (5) (as amended).

4 The Law of Property Act 1925 s 200 does not apply to disposition of land the title to which is registered: see s 200(3). As to estate contracts see *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415. Failure so to register may have consequences in equity while preserving an estate contract at law: *Wright v Dean* supra.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/ (2) CONVEYANCE OF EASEMENTS/127. Contracts for disposition of an easement.

127. Contracts for disposition of an easement.

An easement is an interest in land¹ and accordingly a contract for the sale or other disposition² of an easement can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each³. The terms may be incorporated in a document either by being set out in it or by reference to some other document⁴. The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract⁵. An easement cannot be disposed of apart from the dominant tenement⁶.

1 Ie for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989: s 2(6).

2 For these purposes, 'disposition' has the same meaning as in the Law of Property Act 1925: Law of Property (Miscellaneous Provisions) Act 1989 s 2(6).

3 Ibid s 2(1), replacing the Law of Property Act 1925 s 40. See further SALE OF LAND vol 42 (Reissue) PARA 29 et seq.

4 Law of Property (Miscellaneous Provisions) Act 1989 s 2(2).

5 See ibid s 2(3).

6 See PARA 121 the text and note 2 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/(3) EXTINGUISHMENT OF EASEMENTS BY RELEASE/128. How extinguishment by release is effected.

(3) EXTINGUISHMENT OF EASEMENTS BY RELEASE

128. How extinguishment by release is effected.

Extinguishment by release may be effected either by express release¹ or by circumstances occurring from which a release must be presumed². In all cases of release the competency of the releasing party is of the utmost importance, and in some cases the competency of the released party requires consideration.

1 *Lovell v Smith* (1857) 3 CBNS 120. See also *Davis v Morgan* (1825) 4 B & C 8; *Poulton v Moore* [1915] 1 KB 400, CA (release of right of way by equitable owner of mortgaged land followed by reconveyance by mortgagee).

2 *Davies v Marshall* (1861) 10 CBNS 697; *Salaman v Glover* (1875) LR 20 Eq 444; *Doe d Putland v Hilder* (1819) 2 B & Ald 782 at 791; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478; *Moore v Rawson* (1824) 3 B & C 332; *Liggins v Inge* (1831) 7 Bing 682 at 693; *Stokoe v Singers* (1857) 8 E & B 31; *Hale v Oldroyd* (1845) 14 M & W 789; *Lawrence v Obee* (1814) 3 Camp 514; cf *Winter v Brockwell* (1807) 8 East 308.

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129. Release by absolute owner.

As a general rule a release, whether express or implied, must be made by a party whose estate or interest in the dominant tenement is, as regards duration, either greater than or at least co-extensive with the period for which the easement exists¹. Where the releasor's estate or interest in the dominant tenement is not so extensive in point of duration as the period for which the easement exists, the release will not bind persons entitled to the dominant tenement in remainder or reversion² and, on the termination of the particular estate of the releasor, the easement will revive³. It follows, therefore, that in all cases where a release is relied on as a defence to a claim by prescription to an easement all parties whose estates or interests together make up the fee simple in the dominant tenement must be shown to have concurred in the release, in as much as the grant presumed under the doctrine of prescription can only be an absolute one⁴.

1 The relevance of the quantum of the releasor's estate in the dominant tenement in questions concerning release is only due to the fact that, in order to allow him to effect a valid release of the easement, his estate or interest in that tenement must exceed the period for which the easement is created.

2 See *Davis v Morgan* (1825) 4 B & C 8 (a purported release by a person entitled only to a particular estate in the dominant tenement of an immemorial right to water which ex hypothesi was a perpetual right).

3 See *Davis v Morgan* (1825) 4 B & C 8.

4 See PARA 80 ante.

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130. Release by tenant for life.

A person having the statutory powers of a tenant for life may, with the consent of the trustees, release an easement annexed to the settled land¹.

¹ See the Settled Land Act 1925 s 58(1), (2) (as amended); and SETTLEMENTS; and see *Re Brotherton* (1907) 77 LJ Ch 58; on appeal (1908) 77 LJ Ch 373, CA. Note that, with very limited exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see s 2.

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131. Express and implied releases.

Where the title to an easement has been perfected an extinguishment by release can rarely be effected in any other manner than by an express release or by circumstances so cogent as to preclude the releasor from denying the release¹. Where, however, an easement is claimed by prescription or is based upon the fact of immemorial user, extinguishment or non-completion of the prescriptive claim may readily be presumed from facts pointing to an implied release².

¹ *Harvie v Rogers* (1828) 3 Bli NS 440, HL. See *Snell & Prideaux Ltd v Dutton Mirrors Ltd* [1995] 1 EGLR 259, [1994] EGCS 78, CA, where this paragraph was applied.

² See Co Litt 264b; *Hillary v Waller* (1806) 12 Ves 239 at 265; *Lovell v Smith* (1857) 3 CBNS 120.

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132. How express release is effected.

In order to be effective at common law an express release of an easement must be made by deed¹. Where the strict legal formalities for the release of an easement have not been observed, however, by an application of the general equitable principles of acquiescence and estoppel no person will be allowed to rely upon this non-observance if the circumstances would render such a defence inequitable². Thus if, on the faith of an agreement to release an easement, the owner of the servient tenement has been allowed to lay out money and generally to alter his position in the belief that the destruction or extinction of the easement has been effectually agreed to, the owner of the dominant tenement cannot afterwards enforce his rights under the easement on the ground that the agreement was not by deed³. Similarly, a verbal licence to do some act by which the easement is destroyed or substantially altered cannot be countermanded by the person who gave it, after it has been acted upon⁴.

An express release by deed is, of course, far more satisfactory for the owner of the servient tenement, and is construed with greater strictness against the releasor than any implied release or release by law⁵.

1 *Lovell v Smith* (1857) 3 CBNS 120 at 127, per Willes J; *Sherborne and Windrush Estates Ltd v Dyer* (1957) 50 R & IT 378, Lands Tribunal (attempted excision under hand of reservation of sporting rights). See also *Co Litt* 264b; cf however *Norbury v Meade* (1821) 3 Bli 211 at 241-242, HL, per Lord Redesdale.

2 *Waterlow v Bacon* (1866) LR 2 Eq 514, where a person who had verbally agreed to allow alterations involving the obstruction of light to his skylights was restrained from claiming damages for the obstruction; *Fisher v Moon* (1865) 11 LT 623, where a purchaser of a cottage was restrained from prosecuting an action (now known as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18) against the owner of the servient tenement who had, upon a verbal agreement with the former owner of the dominant tenement, interfered with the windows of that tenement; *Davies v Marshall* (1861) 10 CBNS 697. See PARA 39 ante.

3 *Davies v Marshall* (1861) 10 CBNS 697 at 710; *Salaman v Glover* (1875) LR 20 Eq 444; *Johnson v Wyatt* (1863) 2 De GJ & Sm 18, where a delay of five weeks after knowledge of an intention to build so as to obstruct light was held, under the particular circumstances, not such acquiescence as to disentitle the plaintiff to relief; *Liggins v Inge* (1831) 7 Bing 682. A 'plaintiff' is now known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

4 *Liggins v Inge* (1831) 7 Bing 682 at 694 per Tindal CJ; *Winter v Brockwell* (1807) 8 East 308. A contract to release an easement must be in writing and comply with the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 127 ante.

5 *Co Litt* 264b: 'A release in law shall be expounded more favourable, according to the intent and meaning of the parties, than a release in deed, which is the act of the party, and shall be taken most strongly against himself'.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/(3) EXTINGUISHMENT OF EASEMENTS BY RELEASE/133. When release is implied.

133. When release is implied.

The extinguishment of an easement by implied release must be based upon the intention of the dominant owner¹. To establish abandonment the conduct of the dominant owner must have been such as to make it clear that he had, at the relevant time, a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else². It is a question of fact whether an act amounts to an abandonment or was intended as such³. The intention to release an easement will be less readily presumed where the title to the easement has been perfected than where the title still remains inchoate⁴, and it will be less readily presumed from non-user in the case of negative easements which are acquired by mere occupancy than in the case of positive easements acquired by actual physical user⁵.

It seems that there can be a partial abandonment of the full extent of an easement⁶.

1 *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478 at 482; *Moore v Rawson* (1824) 3 B & C 332 at 338. In the case of light the intention must be clearly established: *Greenwood v Hornsey* (1886) 33 ChD 471.

2 *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528 at 553, [1971] 2 All ER 475 at 492, CA; *Gotobed v Pridmore* (1970) 115 Sol Jo 78, CA; *Re Yately Common, Hampshire*, *Arnold v Dodd* [1977] 1 All ER 505, [1977] 1 WLR 840; *Williams v Usherwood* (1983) 45 P & CR 235, CA; *Marine and General Mutual Life Assurance Society v St James Real Estate Co Ltd* [1991] 2 EGLR 178, [1991] 38 EG 230, Mayor's and City of London Court.

3 *Cook v Bath Corpn* (1868) LR 6 Eq 177 at 179; and see *Midland Rly Co v Gribble* [1895] 2 Ch 827, CA; *Drewett v Sheard* (1836) 7 C & P 465; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA.

4 *Smith v Baxter* [1900] 2 Ch 138 at 146. Cf *Cooper v Straker* (1888) 40 ChD 21. See PARA 122 ante.

5 *Moore v Rawson* (1824) 3 B & C 332 at 339-340 per Littledale J.

6 *Drewett v Sheard* (1836) 7 C & P 465; *Snell & Prideaux Ltd v Dutton Mirrors Ltd* [1995] 1 EGLR 259, [1994] EGCS 78, CA, where this paragraph was applied.

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134. Effect of mere non-user.

In no case, whether the title to an easement has been perfected or not, or whether the easement is negative or positive, will mere non-user of a right alone cause extinguishment; the suspension of the exercise of a right is not sufficient to prove an intention to abandon it¹. There must be other circumstances in the case to raise a presumption of the intention to abandon², and abandonment will not lightly be inferred³.

1 *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478 at 482 per Lord Chelmsford LC; *Ward v Ward* (1852) 7 Exch 838 at 839; *Cooke v Ingram* (1893) 68 LT 671; *Bulstrode v Lambert* [1953] 2 All ER 728, [1953] 1 WLR 1064; *Gotobed v Pridmore* (1970) 115 Sol Jo 78, CA.

2 *Ward v Ward* (1852) 7 Exch 838; *Swan v Sinclair* [1924] 1 Ch 254, CA; affd [1925] AC 227, HL (non-user of right of way for long period, and acquiescence in obstructions); *Benn v Hardinge* (1992) 66 P & CR 246, CA; *Bosomworth v Faber* (1992) 69 P & CR 288, [1992] NPC 155, CA; *Carder v Davies* (1998) 76 P & CR D33, CA.

3 *Gotobed v Pridmore* (1970) 115 Sol Jo 78, CA.

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135. Period of non-user.

The duration of the period of non-user is only material as one element from which the dominant owner's intention to retain or abandon his easement may be inferred, and what period may be sufficient in any particular case must depend on the strength of the other indications of intention and all other accompanying circumstances¹. If, however, the period of suspension of user is of very long duration, it appears that the suspension alone may raise a prima facie presumption of abandonment to the extent of throwing upon the person seeking to uphold the right the burden of showing that some indication of his intention to preserve the right was manifested during the period of suspension².

In some of the older cases it is suggested that, upon the analogy of the doctrine which presumes a grant from long user, a period of 20 years' non-user of an easement will raise a prima facie case against the claimant of the easement that he has released the right³. There is, however, no hard and fast rule that 20 years' non-user raises a prima facie presumption of a release⁴, and in the light of more modern decisions, where very substantial periods of non-user have been held insufficient to raise the presumption, the older cases cannot necessarily be treated as correct⁵. The cesser in the exercise of the right may moreover be explained in such a manner that the non-user will not affect the question of abandonment in the least⁶, if, that is, it can be shown to have been due to some sufficient cause other than an apparent intention of the dominant owner to abandon his right⁷.

1 *R v Chorley* (1848) 12 QB 515 at 519; *Mulville v Fallon* (1872) IR 6 Eq 458; *Cook v Bath Corpn* (1868) LR 6 Eq 177; *Lovell v Smith* (1857) 3 CBNS 120; *Norbury v Meade* (1821) 3 Bli 211, HL; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478; *Cooke v Ingram* (1893) 68 LT 671; *James v Stevenson* [1893] AC 162, PC; *Young v Star Omnibus Co Ltd* (1902) 86 LT 41; cf also *Hall v Swift* (1838) 4 Bing NC 381.

2 *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478 at 482 per Lord Chelmsford LC.

3 *Moore v Rawson* (1824) 3 B & C 332 at 339 per Littledale J; *Lovell v Smith* (1857) 3 CBNS 120; *Doe d Putland v Hilder* (1819) 2 B & Ald 782 at 791.

4 *R v Chorley* (1848) 12 QB 515, where the court said that it would be wrong to lay down as a rule of law, or even as a conclusive presumption of fact, that no interruption for a shorter period than 20 years would destroy the right, but suggested that if a mere ceasing to use the easement or a mere acquiescence in the interruption was relied on it would not be prudent for the jury to rely on such mere cesser or acquiescence unless shown for 20 years.

5 See *Cook v Bath Corpn* (1868) LR 6 Eq 177 (35 years); *James v Stevenson* [1893] AC 162, PC (50 years); *Gotobed v Pridmore* (1970) 115 Sol Jo 78, CA (51 years); *Benn v Hardinge* (1992) 66 P & CR 246, CA (175 years); *Charles v Beach* [1993] NPC 102, [1993] EGCS 124, CA (60 years). For cases where abandonment has been found see *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478; *Swan v Sinclair* [1924] 1 Ch 254, CA; affd [1925] AC 227, HL; *Howton v Hawkins* (1966) 110 Sol Jo 547.

6 *Ward v Ward* (1852) 7 Exch 838, where a right of way had not been used because there was another more convenient way during the period of cesser.

7 *Ward v Ward* (1852) 7 Exch 838; *James v Stevenson* [1893] AC 162 at 168, PC (non-user of a way coupled with the use of the land by the servient owner for agricultural purposes for many years when the way was not required held not sufficient evidence of abandonment); *Payne v Shedden* (1834) 1 Mood & R 382; *Lovell v Smith* (1857) 3 CBNS 120.

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136. Alterations of dominant tenement.

An intention to abandon an easement may be inferred from alterations made to the dominant tenement which render the continued user of the easement impossible or unnecessary. Thus, if the easement be attached to the particular user of a building and the owner pulls down or destroys the building with the intention of relinquishing the easement, he cannot afterwards change his mind and claim the easement¹. If it can be inferred from his acts that he has abandoned his right to the benefit of the easement, the easement may be extinguished, even though the non-user is for a much less period than 20 years².

¹ *Liggins v Inge* (1831) 7 Bing 682 at 693 per Tindal CJ ('suppose a person who formerly had a mill on a stream should pull it down and remove the works with the intention never to return. Could it be held that the owner of the other land adjoining the stream might not erect a mill and employ the water so relinquished?'); *Ankersen v Connolly* [1906] 2 Ch 544; affd on the facts [1907] 1 Ch 678, CA (light); *Lawrence v Obee* (1814) 3 Camp 514; *Moore v Rawson* (1824) 3 B & C 332; cf *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA. See also *WH Bailey & Son Ltd v Holborn and Frascati Ltd* [1914] 1 Ch 598.

² *Moore v Rawson* (1824) 3 B & C 332 at 341 per Littledale J. See also *Young v Star Omnibus Co Ltd* (1902) 86 LT 41.

UPDATE

136 Alterations of dominant tenement

NOTE 2--See *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214, [2005] 1 P & CR 520 (combination of structural changes to, and change in use of, land extinguished easement of drainage granted by implication on sale of land).

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137. Where burden of easement is increased.

An intention to abandon an easement may be inferred from alterations made in the dominant tenement or in the mode of using the easement by which the burden of the easement is materially increased¹. Where the alteration is substantial an intention to abandon the easement will be more readily presumed than where the alteration is slight², but there is no precise test of what amount of alteration will cause an extinguishment³. It is a question of great difficulty, upon alterations being made to the dominant tenement which increase the burden of the servitude, whether the dominant owner has lost the whole easement or can merely be restrained from making the excessive user⁴.

It is doubtful whether any excessive user, at least of a discontinuous easement, in whatever respect the user may be excessive, will ever of itself bring to an end or indeed suspend such an easement⁵.

1 *Ankersen v Connelly* [1906] 2 Ch 544; affd on the facts [1907] 1 Ch 678, CA, where a window of a shed open in front to the plaintiff's yard overlooked the defendant's land and the plaintiff (now usually referred to as 'the claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18) roofed in the whole of his yard and thus made the window the only means of access of light to the shed; see also *Scott v Pape* (1886) 31 ChD 554 at 566, CA. Cf *Harris v Flower* (1904) 74 LJ Ch 127, CA (where the excessive user of a right of way was held not to have extinguished the easement by abandonment); *Hall v Swift* (1838) 4 Bing NC 381 (natural right to water); *Saunders v Newman* (1818) 1 B & Ald 258; *Smith v Baxter* [1900] 2 Ch 138. Cf also *White v Grand Hotel, Eastbourne Ltd* [1913] 1 Ch 113, CA; affd sub nom *Grand Hotel, Eastbourne Ltd v White* 84 LJ Ch 938, HL.

2 *Garritt v Sharp* (1835) 3 Ad & El 325 at 330 per Lord Denman CJ ('A party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether'); and cf *Cotterell v Griffiths* (1801) 4 Esp 69; *Allan v Gomme* (1840) 11 Ad & El 759 at 772.

3 *East India Co v Vincent* (1740) 2 Atk 83 per Lord Hardwicke.

4 See *Scott v Pape* (1886) 31 ChD 554, CA; *Tapling v Jones* (1865) 11 HL Cas 290.

5 *Graham v Philcox* [1984] QB 747, [1984] 2 All ER 643, CA.

UPDATE

137 Where burden of easement is increased

NOTE 1--See *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214, [2005] 1 P & CR 520 (structural change and change in use of land, which would increase waterflow through drainage system, extinguished easement of drainage).

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138. Where burden of easement is not increased.

If the alteration in the dominant tenement or in the mode of using an easement is not of such a nature that the burden of the easement is substantially changed, or the burden on the servient tenement materially increased, the easement is not destroyed in consequence of the alteration¹. There appears to be no difference between the amount of alteration which will involve the loss of the right when acquired and the amount of alteration which will prevent the acquisition of the right².

1 *Barnes v Loach* (1879) 4 QBD 494 at 498 (easement of light not destroyed by setting back the walls and opening new windows of the same size in the new walls); *Andrews v Waite* [1907] 2 Ch 500, following *Scott v Pape* (1886) 31 ChD 554, CA; *Hale v Oldroyd* (1845) 14 M & W 789; *Harris v Flower* (1904) 74 LJ Ch 127, CA; *Lloyds Bank Ltd v Dalton* [1942] Ch 466, [1942] 2 All ER 352 (alteration of dominant tenement not such as substantially to increase burden of support from adjoining property); *Attwood v Bovis Homes Ltd* [2001] Ch 379, [2000] 4 All ER 948 (though the same principles apply to all easements a change in the nature of the dominant tenement is more likely to cause substantial changes in the extent and nature of the use of a right of way than in the case of an easement of support or drainage. On the facts the proposed change from agricultural to residential and commercial use would not increase the burden on the servient tenement and the dominant tenement would continue to enjoy the easement of drainage).

2 *Andrews v Waite* [1907] 2 Ch 500 at 509 per Neville J.

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(4) EXTINGUISHMENT OF EASEMENTS BY UNITY OF OWNERSHIP

139. Effect of unity of ownership.

An easement is extinguished when the dominant and the servient tenements become united in fee simple in common ownership. Although easements are sometimes said to be extinguished by merger¹, a more appropriate description of the cause of cesser is extinguishment by unity of ownership². The term 'extinguishment' is more appropriate, since it more especially denotes the obliteration of a collateral right or interest in the estate out of which it is derived³. Extinguishment by unity of ownership of easements, whether created originally in perpetuity or for a limited period⁴, takes place upon the dominant and servient tenements becoming united in the common ownership of the same person. When one person becomes the owner of both tenements all easements over the servient tenement are thereupon extinguished⁵. This occurs for the most part only in cases where the common owner is owner in fee simple of both tenements⁶.

The doctrine of extinguishment of easements by unity of ownership, like the doctrine of implied release and abandonment, is based upon the intention of the dominant owner; but it has acquired its individuality by reason of the comparative certainty of an extinguishment being effected by implied release when both tenements come into the absolute ownership of one person. In such a case no difficulties arise as to the rights of remaindermen or reversioners of either tenement, nor is any easement of such a perpetual and binding nature that it cannot be disposed of by the owner of the fee simple⁷.

1 See *Thomson v Waterlow* (1868) LR 6 Eq 36 at 41 per Lord Romilly MR.

2 *Whalley v Tompson* (1799) 1 Bos & P 371; *Buckby v Coles* (1814) 5 Taunt 311, the marginal note to which does not agree with the case as reported: see 15 RR 508n. The doctrine of extinguishment by unity of ownership also applies to rights of common (*Re Yately Common, Hampshire, Arnold v Dodd* [1977] 1 All ER 505 at 515, [1977] 1 WLR 840 at 851 per Foster J) and to restrictive covenants (see *Re Tiltwood, Sussex, Barrett v Bond* [1978] Ch 269, [1978] 2 All ER 1091; and EQUITY vol 16(2) (Reissue) PARA 621). Different considerations apply, however, where the restrictive covenant arises under a building scheme: see EQUITY vol 16(2) (Reissue) PARA 625.

3 Cru Dig, Merger, 39, s 1(4).

4 *Lord Dynevor v Tennant* (1886) 32 ChD 375; affd 33 ChD 420, CA; (1888) 13 App Cas 279, HL.

5 Co Litt 313a; *Buckby v Coles* (1814) 5 Taunt 311; *Heigate v Williams* (1606) Noy 119; *James v Plant* (1836) 4 Ad & El 749 at 761, Ex Ch; *Payne v Inwood* (1996) 74 P & CR 42, CA. Cf *R v Hermitage Inhabitants* (1692) Carth 239; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA; *Richardson v Graham* [1908] 1 KB 39, CA.

6 See Co Litt 313a, 313b. The true view is probably that extinguishment by unity of ownership is only effected where the ownership is for an estate in fee simple, although there is no express authority upon the point. Cf *James v Plant* (1836) 4 Ad & El 749 at 761, Ex Ch, where it is said 'we all agree that where there is a unity of seisin of the land and of the way over the land in one and the same person, the right of way is either extinguished or suspended according to the duration of the respective estates in the land and in the way'. See also *Simper v Foley* (1862) 2 John & H 555 at 563 per Page Wood V-C, and *Richardson v Graham* [1908] 1 KB 39 at 46, CA, where Buckley LJ said that he could not see how *Simper v Foley* supra was an authority for saying that where the unity of ownership is for the same estate there is an extinction of the easement. Cf *Longton v Winwick Asylum Visitors Committee* (1911) 75 JP 348 (continuance of easements notwithstanding unity of ownership and possession); on appeal (1912) 76 JP 113, CA; and *Head v Meara* [1912] 1 IR 262.

7 See note 6 supra.

UPDATE

139 Effect of unity of ownership

NOTE 6--Merger of a lease into a larger interest in the dominant tenement is not in itself fatal to the continued existence of an easement granted by a clause in the lease for the period for which it was granted: *Wall v Collins*[2007] EWCA Civ 444, [2008] 1 All ER 122.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/(4) EXTINGUISHMENT OF EASEMENTS BY UNITY OF OWNERSHIP/140. After unity of ownership enjoyment is referable to ownership.

140. After unity of ownership enjoyment is referable to ownership.

When the servient tenement has come into the ownership of the dominant owner all acts which he may do upon the former tenement are referable to his ownership of that tenement and not to the former right which he had as an easement¹. If it is alleged that a person and his ancestors have been in possession of two adjoining fields, and a prescriptive claim is set up for an easement in favour of one over the other of them, the prescription is self-destructive; and if the fields were let to different tenants, and from time immemorial a causeway has been built over one to the other, by which the tenants have passed and repassed, then, although the causeway is a road in fact, there can be no right of way in point of law, for no right can exist in the owner independent of the fee simple².

1 *Whalley v Thompson* (1799) 1 Bos & P 371 at 376 per Eyre CJ; *Thomson v Waterlow* (1868) LR 6 Eq 36 at 43 per Lord Romilly MR; *Bright v Walker* (1834) 1 Cr M & R 211 at 219 per Parke B.

2 *Whalley v Thompson* (1799) 1 Bos & P 371.

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141. Ownership of both tenements for different estates.

The effect of a union of the ownership of the dominant and servient tenements for different estates is not to extinguish the easement, but merely to suspend it so long as the union of ownership continues, and upon severance of the ownership the easement revives¹.

¹ *Simper v Foley* (1862) 2 John & H 555 at 563-564 per Page Wood V-C.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/(4) EXTINGUISHMENT OF EASEMENTS BY UNITY OF OWNERSHIP/142. Unity of ownership without unity of possession.

142. Unity of ownership without unity of possession.

Unity of ownership of the dominant and servient tenements unaccompanied by unity of possession and enjoyment does not effect an extinguishment of an easement of light as against the tenant in possession of the dominant tenement¹. Thus, if the dominant tenement is in possession of a lessee the acquisition by the servient owner of the freehold reversion to the dominant tenement will not extinguish an easement of light during the continuance of the lease². This rule is founded partly on the peculiar nature of prescription in the case of light which need not be founded on user as of right, but it is not clear whether unity of ownership may destroy other easements without unity of possession and enjoyment³. On the other hand, unity of possession without unity of ownership will never extinguish an easement⁴.

1 *Richardson v Graham* [1908] 1 KB 39 at 46, CA; explaining *Simper v Foley* (1862) 2 John & H 555.

2 *Richardson v Graham* [1908] 1 KB 39 at 43, CA, per Lord Alverstone CJ; *Robson v Edwards* [1893] 2 Ch 146. See also *Fear v Morgan* [1906] 2 Ch 406, CA; affd sub nom *Morgan v Fear* [1907] AC 425, HL.

3 *Buckby v Coles* (1814) 5 Taunt 311 at 315, where Macdonald CB said that a right of way was not extinguished by unity of ownership because the dominant tenement was subject to a lease. The former Court of Common Pleas, however, expressed a decided opinion against this view, and it was abandoned by counsel. See also *Simper v Foley* (1862) 2 John & H 555.

4 Co Litt 114b; *Canham v Fisk* (1831) 2 Cr & J 126; *Thomas v Thomas* (1835) 2 Cr M & R 34. There are numerous dicta to the effect that unity of possession is sufficient to cause extinguishment. 'Possession' must be taken in a broad sense to mean 'possessed of an estate in fee simple'. For various instances of this use of 'possession' see *Whalley v Thompson* (1799) 1 Bos & P 371 at 376, per Eyre CJ; Bro Abr, Extinguishment and Suspension, pl 15. Cf generally *Hulbert v Dale* [1909] 2 Ch 570 at 578, CA; *Stott v Stott* (1812) 16 East 343.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/3. CONVEYANCE AND EXTINGUISHMENT OF EASEMENTS/(5) EXTINGUISHMENT OF EASEMENTS BY STATUTE/143. Extinguishment by statute.

(5) EXTINGUISHMENT OF EASEMENTS BY STATUTE

143. Extinguishment by statute.

The extinguishment of an easement by Act of Parliament¹ may be effected directly under the express provisions of the statute² or indirectly as an implied provision³; or it may arise as the indirect consequence of the Act by the exercise of statutory powers bestowed by it⁴.

Where the continuance of an easement is inconsistent with the carrying out of any works under statutory powers, the result is that an extinguishment of the easement by implication occurs⁵.

1 *Turner v Crush*(1879) 4 App Cas 221, HL; see also *White v Reeves* (1818) 2 Moore CP 23; *Holden v Tilley* (1859) 1 F & F 650.

2 Eg as in the Inclosure Acts (see COMMONS vol 13 (2009) PARA 419 et seq); or in the Town and Country Planning Act 1990 s 236 and the Planning (Listed Buildings and Conservation Areas) Act 1990 s 51 (see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 955; TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1160).

3 *Yarmouth Corpn v Simmons*(1878) 10 ChD 518 (pier erected under statutory powers, the erection of which necessarily involved the obstruction of a right of way from a public road to the seashore); *New Windsor Corpn v Taylor*[1899] AC 41 at 49, HL.

4 See eg *Emsley v North Eastern Rly Co*[1896] 1 Ch 418 at 429, CA, where an injunction to restrain a railway company from building so as to interfere with light was refused upon the ground of the company's statutory powers. Cf *Wells v London, Tilbury and Southend Rly Co*(1877) 5 ChD 126, CA. For examples of extinguishment, directly or indirectly see *Clark v London School Board*(1874) 9 Ch App 120 (Elementary Education Act 1870 (repealed)); *Harber v Rand* (1821) 9 Price 58; *Logan v Burton* (1826) 5 B & C 513; *Thackrah v Seymour* (1832) 3 Tyr 87; *R v Marquis of Downshire* (1836) 4 Ad & El 698; *Turner v Crush*(1879) 4 App Cas 221, HL (Inclosure (Consolidation) Act 1801 (repealed)); *R v Hatfield Inhabitants* (1835) 4 Ad & El 156 (Private Inclosure Acts); *Macey v Metropolitan Board of Works* (1864) 33 LJ Ch 377 (Thames Embankment Act 1862); *Duke of Bedford v Dawson*(1875) LR 20 Eq 353; *Wigram v Fryer*(1887) 36 ChD 87; *Kirby v Harrogate School Board*[1896] 1 Ch 437, CA; *Pinchin v London and Blackwall Rly Co* (1854) 5 De G M & G 851; *Hill v Midland Rly Co*(1882) 21 ChD 143 (Lands Clauses Consolidation Act 1845); *A-G v Shonleigh Nominees Ltd*[1972] 2 All ER 263, [1972] 1 WLR 577, CA (Defence Act 1842 s 14 (as amended)); *London Regional Transport v Imperial Group Pension Trust Ltd*[1987] 2 EGLR 20, 284 Estates Gazette 1593 (London Transport Act 1964 s 14 (repealed)). For an instance where a right of support survived for the benefit of the dominant owner notwithstanding that the servient tenement was ordered to be demolished by the local authority under statutory powers see *Bond v Nottingham Corpn*[1939] Ch 847, [1939] 3 All ER 669; affd [1940] Ch 429, [1940] 2 All ER 12, CA.

5 *Yarmouth Corpn v Simmons*(1878) 10 ChD 518 at 526-527.

UPDATE

143 Extinguishment by statute

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(1) INTERFERENCE WITH EASEMENTS/144. Interference with easement as a nuisance.

4. DISTURBANCE OF EASEMENTS

(1) INTERFERENCE WITH EASEMENTS

144. Interference with easement as a nuisance.

The wrongful interference with an easement constitutes a private nuisance¹, that is to say, an injury done to a person in possession of property in land by which his enjoyment of that property is adversely affected². There is, however, this difference between a nuisance in a case where no easement is affected and a nuisance arising from interference with an easement, that in the latter case the existence of the easement must be established before any redress can be obtained, whereas in the former case the rights infringed are rights which the law attaches to the enjoyment of property³. Except in this respect the wrong done in both cases is the same, and the remedies which are available to the injured party are to all intents and purposes identical⁴.

1 *Lane v Capsey*[1891] 3 Ch 411; *Thorpe v Brumfitt*(1873) 8 Ch App 650; *Goldsmid v Tunbridge Wells Improvement Comrs*(1866) 1 Ch App 349; *Colls v Home and Colonial Stores Ltd*[1904] AC 179, HL; *Higgins v Betts*[1905] 2 Ch 210; *Saint v Jenner*[1973] Ch 275, [1973] 1 All ER 127, CA; *Deakins v Hookings*[1994] 1 EGLR 190, [1994] 14 EG 133, Mayor's and City of London Court. As to the distinction between a nuisance and a trespass see NUISANCE; TORT.

2 See 3 Bl Com (14th Edn) 216; *Jones v Chappell*(1875) LR 20 Eq 539 at 543. See also NUISANCE.

3 *Aldred's Case* (1610) 9 Co Rep 57b; *Higgins v Betts*[1905] 2 Ch 210. For an example of failure to establish an easement as a prerequisite to suing for nuisance by disturbance of it see *Paine & Co Ltd v St Neots Gas and Coke Co*[1938] 4 All ER 592; affd [1939] 3 All ER 812, CA (some out of several commoners are not competent to grant an easement over commonable land; and ex hypothesi the alleged dominant owner cannot have possession of any corporeal interest in the alleged servient tenement enabling him to support a claim for trespass). See further NUISANCE.

4 *Higgins v Betts*[1905] 2 Ch 210. A successor in title of the servient owner who 'adopts' a substantial interference with an easement will be liable for it under the principle in *Sedleigh-Denfield v O'Callaghan*[1940] AC 880, [1940] 3 All ER 349, HL, as if for a nuisance: *Saint v Jenner*[1973] Ch 275, [1973] 1 All ER 127, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(1) INTERFERENCE WITH EASEMENTS/145. Every interference is not actionable.

145. Every interference is not actionable.

Not every interference with an easement amounts to an actionable wrong, for, among other reasons, positive easements never give a right to an exclusive enjoyment of the servient tenement¹, while in the case of negative easements there must always be a substantial interference with the enjoyment to give rise to a cause of action². Thus, in the case of a right of way there is no disturbance if, according to its nature, the way can be practically and substantially exercised as conveniently as before the obstruction occurred³.

Again, in the case of a disturbance of an easement of light there must be a substantial deprivation of the light rendering the building uncomfortable according to the ordinary notions of mankind and preventing the owner from carrying on his accustomed occupation on the premises as beneficially as he did prior to the obstruction⁴.

1 *Sketchley v Berger* (1893) 69 LT 754 at 755; *Clifford v Hoare* (1874) LR 9 CP 362; *FC Strick & Co Ltd v City Offices Co Ltd* (1906) 22 TLR 667; *Hutton v Hamboro* (1860) 2 F & F 218; *Reilly v Booth* (1890) 44 ChD 12 at 26, CA; *Capel v Buszard* (1829) 6 Bing 150 at 159, Ex Ch. Cf *Thorpe v Brumfitt* (1873) 8 Ch App 650 at 656; *Holywell Union and Halkyn Parish v Halkyn Drainage Co* [1895] AC 117, HL; *Southport Corp'n v Ormskirk Union Assessment Committee* [1894] 1 QB 196 at 201, CA. Thus the dominant owner cannot claim for physical damage to the servient tenement unless it substantially interferes with his enjoyment of the easement: see *Weston v Lawrence Weaver Ltd* [1961] 1 QB 402, [1961] 1 All ER 478.

2 *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL.

3 *Hutton v Hamboro* (1860) 2 F & F 218 at 219 per Cockburn CJ. See also *Saint v Jenner* [1973] Ch 275, [1973] 1 All ER 127, CA; *Harding v Wilson* (1823) 2 B & C 96; and *Clifford v Hoare* (1874) LR 9 CP 362, where the interference with a right of way complained of consisted in the erection of a portico projecting only two feet into a roadway 40 feet wide, and it was held that such an interference gave no rise to a cause of action. As to what amounts to a disturbance of a right of way see PARA 177 post. As to wrongful interference with the easements relating to water see PARA 197 et seq post.

4 *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; *Back v Stacey* (1826) 2 C & P 465. As to interference with the easement of light see PARA 224 post; and as to interference with the easement of support see PARA 180 et seq post. See also *Davis v Marrable* [1913] 2 Ch 421; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/146. Abatement generally.

(2) REMEDIES FOR INTERFERENCE

146. Abatement generally.

Wrongful interference with an easement may be remedied either by abatement or by bringing a claim¹. To abate a nuisance the dominant owner may enter the servient tenement and remove the obstruction². Such an entry gives no cause of action to the servient owner³, but, in abating the nuisance, the dominant owner must act reasonably⁴.

The 'ancient remedies of self-help', it has been said⁵, should be carefully scrutinised in the present day and certainly not extended. Self-redress is a summary remedy which is justified only in clear and simple cases, or in an emergency. In particular where a claimant has applied for a mandatory injunction and failed, the sole justification for a summary remedy has gone⁶.

1 *Baten's Case* (1610) 9 Co Rep 53b at 54b; *Penruddock's Case* (1598) 5 Co Rep 100b; Bro Abr, Nuisance, pl 33; *R v Rosewell* (1699) 2 Salk 459; *Perry v Fitzhowe* (1846) 8 QB 757; *Thompson v Eastwood* (1852) 8 Exch 69; *Lane v Capsey* [1891] 3 Ch 411.

2 *Lane v Capsey* [1891] 3 Ch 411; *Baten's Case* (1610) 9 Co Rep 53b; *Hill v Cock* (1872) 26 LT 185. Cf *Campbell Davys v Lloyd* [1901] 2 Ch 518, CA; *Wigford v Gill* (1592) Cro Eliz 269.

3 *Baten's Case* (1610) 9 Co Rep 53b.

4 *Roberts v Rose* (1865) LR 1 Exch 82, Ex Ch; *James v Hayward* (1630) W Jo 221 at 222; *Lane v Capsey* [1891] 3 Ch 411.

5 See *Stear v Scott* [1992] RTR 226n, DC, per Kerr LJ, referred to by Nolan LJ in *Lloyd v DPP* [1992] 1 All ER 982, [1992] RTR 215, DC and by Sullivan J in *Chamberlain v Lindon* [1998] 2 All ER 538, [1998] 1 WLR 1252, DC.

6 *Burton v Winters* [1993] 3 All ER 847, [1993] 1 WLR 1077, CA, citing *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226 at 244, HL, per Lord Atkinson; *Chamberlain v Lindon* [1998] 2 All ER 538, [1998] 1 WLR 1252, DC. Cf *Co-operative Wholesale Society Ltd v British Railways Board* (1995) Times, 20 December, CA, where it was held that the Society was entitled to demolish the bilging wall which was a risk to safety and to recover the cost of demolition, but had no right to rebuild the wall and could not recover the cost of doing so.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/147. Notice of intention to abate.

147. Notice of intention to abate.

A nuisance may be abated without notice to the owner of the land upon which the interference with the right may occur, provided it is not necessary to enter that land for the purpose of abating the nuisance¹. Where the abatement cannot be made without entering another's land, notice should, except in cases of urgency², be given to remove the nuisance, if the entry is likely to lead to a breach of the peace³.

1 *Lemmon v Webb* [1895] AC 1 at 5, HL. See also *Earl of Lonsdale v Nelson* (1823) 2 B & C 302 at 311; and *London City Sowers Comrs v Glasse* (1872) 7 Ch App 456 at 464, where James LJ suggests that it is reasonable to give notice in every case.

2 *Lane v Capsey* [1891] 3 Ch 411; *Jones v Williams* (1843) 11 M & W 176.

3 *Davies v Williams* (1851) 16 QB 546; *Lane v Capsey* [1891] 3 Ch 411. As to entry to carry out works under the Access to Neighbouring Land Act 1992 see PARA 112 et seq ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/148. Mode of abatement.

148. Mode of abatement.

In abating a nuisance no more may be done than will actually remove the interference with the right¹. The owner of the dominant tenement must do nothing which is not practically necessary for the abatement of the nuisance². He must abate the nuisance in the most reasonable manner possible³.

If there are two ways of abating the nuisance he must choose the less mischievous of the two. If by one of these alternative methods some wrong would be done to an innocent third party or to the public, then that method cannot be justified at all, although an interference with the wrongdoer himself might be justified. Therefore a method which involves an interference with the rights of an innocent third party or the public must not be adopted; and it may become necessary to abate the nuisance in a manner more onerous to the wrongdoer⁴.

1 See *Greenslade v Halliday* (1830) 6 Bing 379 (right to place dam of loose stones across stream and occasionally a board; later fixed by stakes; not only stakes but also board removed: excessive abatement); see also *Perry v Fitzhowe* (1846) 8 QB 757 at 775; *Davies v Williams* (1851) 16 QB 546 at 556; *Hill v Cock* (1872) 26 LT 185.

2 *Hill v Cock* (1872) 26 LT 185 at 186 per Willes J; *Roberts v Rose* (1865) LR 1 Exch 82 at 87, Ex Ch.

3 *Hill v Cock* (1872) 26 LT 185 at 186 per Willes J.

4 *Roberts v Rose* (1865) LR 1 Exch 82 at 89, Ex Ch, per Blackburn J.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/149. Excessive user of easement.

149. Excessive user of easement.

The same principles as apply to interferences with easements¹ govern interferences with the enjoyment of the servient tenement, the owner of which may abate nuisances to his tenement caused by the wrongful or excessive user of an easement by the owner of the dominant tenement. The servient owner cannot obstruct excessive user by one dominant owner if by so doing he obstructs the rightful user by others², but if the excessive user of an easement cannot be abated without obstructing the whole user of the easement by the person who is making an unlawful excess of the user, the owner of the servient tenement may obstruct the whole of that user³. In the case of the easement of light, however, a servient owner cannot obstruct windows in respect of which his neighbour has not acquired an easement against him, if by doing so he obstructs other windows in respect of which his neighbour has acquired such an easement⁴.

1 See PARA 146 et seq ante.

2 *A-G v Dorking Union Guardians* (1882) 20 ChD 595, CA; *A-G v Acton Local Board* (1882) 22 ChD 221.

3 *Cawkwell v Russell* (1856) 26 LJ Ex 34.

4 *Tapling v Jones* (1865) 11 HL Cas 290; *Newson v Pender* (1884) 27 ChD 43, CA; *Frechette v Cie Manufacturière de St Hyacinthe* (1883) 9 App Cas 170, PC; *Binckes v Pash* (1862) 11 CBNS 324. Cf *Renshaw v Bean* (1852) 18 QB 112, which was overruled by *Tapling v Jones* supra, and *Weatherley v Ross* (1863) 1 Hem & M 349; *Hutchinson v Copestake* (1861) 9 CBNS 863, Ex Ch; *Davies v Marshall* (1861) 1 Drew & Sm 557; *Cooper v Hubbuck* (1860) 30 Beav 160.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/150. Claim for interference.

150. Claim for interference.

The remedy by a claim for interference with an easement may be pursued whether the easement which is alleged to have been disturbed was created by grant, arose by implication of law, or is claimed under the doctrine of prescription¹.

¹ Com Dig, Action upon the Case for a Disturbance (A2); *Chollocombe v Tucker* (1614) 1 Roll Abr 109, pl 38. The authorities cited in this note refer to a remedy by action; but an 'action' is now generally referred to as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/151. Who may sue.

151. Who may sue.

Any person entitled to the possession of the dominant tenement may sue in respect of an interference with an easement appurtenant to that tenement¹. If the wrong done is such as to involve a permanent injury to the dominant tenement², or the interference is such that unless some step is taken that interference will operate as a denial of right³, a person interested in the dominant tenement in reversion or remainder may sue in respect of the interference with the easement. In such cases, both the person in possession and the person in remainder or reversion may recover damages for their respective losses⁴. In the absence of these prejudicial elements, however, a person in reversion or remainder cannot sue⁵. Thus, where the injury is of a purely temporary nature⁶, or where the remainderman or reversioner cannot be prejudiced by any adverse acts, because the adverse acts could not involve acquiescence on his part, the remainderman or reversioner cannot maintain a claim⁷.

1 The leading case as to who can sue in nuisance is now *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL, where *Khorasandjian v Bush* [1993] QB 727, [1993] 3 All ER 669, CA was overruled. As to claims by a tenant for life see *Simper v Foley* (1862) 2 John & H 555; *Goldsmid v Tunbridge Wells Improvement Comrs* (1866) 1 Ch App 349. As to claims by a tenant from year to year see *Jacomb v Knight* (1863) 3 De GJ & Sm 533. As to weekly tenants see *Jones v Chappell* (1875) LR 20 Eq 539. As to a licence with exclusive possession see *Newcastle-under-Lyme Corp v Wolstanton Ltd* [1947] Ch 92 at 106-108, [1946] 2 All ER 447 at 455-456 per Evershed J (decision reversed [1947] Ch 427, [1947] 1 All ER 218). Exceptionally a person who was in exclusive possession of land but who is unable to prove title to it can sue: *Foster v Warblington UDC* [1906] 1 KB 648, CA.

2 *Shadwell v Hutchinson* (1829) 3 C & P 615; *Baxter v Taylor* (1832) 4 B & Ad 72; *Jackson v Pesked* (1813) 1 M & S 234; *Provost etc of Queen's College, Oxford v Hallett* (1811) 14 East 489. Cf *Bell v Twentyman* (1841) 1 QB 766; *Lord Egremont v Pulman* (1829) Mood & M 404.

3 *Kidgill v Moor* (1850) 9 CB 364; *Bell v Midland Rly Co* (1861) 10 CBNS 287; *Bower v Hill* (1835) 1 Bing NC 549 at 555; *Shadwell v Hutchinson* (1831) 2 B & Ad 97 at 98; *Metropolitan Association v Petch* (1858) 5 CBNS 504. Cf *Raine v Alderson* (1838) 4 Bing NC 702; *Young v Spencer* (1829) 10 B & C 145; *Jesser v Gifford* (1767) 4 Burr 2141.

4 *Bower v Hill* (1835) 1 Bing NC 549 at 555.

5 *Baxter v Taylor* (1832) 4 B & Ad 72; *Jackson v Pesked* (1813) 1 M & S 234. Cf *Simpson v Savage* (1856) 1 CBNS 347; *Mumford v Oxford, Worcester and Wolverhampton Rly Co* (1856) 1 H & N 34.

6 *Baxter v Taylor* (1832) 4 B & Ad 72.

7 *Baxter v Taylor* (1832) 4 B & Ad 72. Cf *Farquhar v Newbury RDC* [1909] 1 Ch 12, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/152. Form of relief granted.

152. Form of relief granted.

Where a person entitled to sue in respect of an interference with an easement proceeds by bringing a claim, the relief granted may include a declaration of right¹ or it may take the form of damages² or an injunction³ to restrain the continuance or repetition of the obstruction, or of both damages and an injunction⁴. Alternatively, the court may award damages and refuse to grant an injunction⁵.

1 *Petty v Parsons* [1914] 2 Ch 653; *Litchfield-Speer v Queen Anne's Gate Syndicate Ltd (No 2)* [1919] 1 Ch 407.

2 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL; *Price v Hilditch* [1930] 1 Ch 500; *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128, CA; see also PARA 153 post.

3 See PARA 154 post.

4 See eg *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 ChD 757; *Cowper v Laidler* [1903] 2 Ch 337.

5 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 192-193, HL; *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128, CA (conduct of the parties on each side weighed and taken into account in awarding damages rather than an injunction). The fact that a local authority cannot remedy a wrong to which it has contributed without authority to borrow is no reason to withhold an injunction against it where damages are insufficient compensation: see *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA; and see CIVIL PROCEDURE vol 11 (2009) PARA 430.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/153. Damages.

153. Damages.

The mere interference with a legal right will entitle the claimant to damages¹. The proof of actual damage is not essential, for if a right has been violated the law will assume damage².

¹ *Sampson v Hoddinott* (1857) 1 CBNS 590 at 611; *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL (power to award damages for threatened injury).

² *Embrey v Owen* (1851) 6 Exch 353; *Wilts and Berks Canal Navigation Co v Swindon Waterworks Co* (1874) 9 Ch App 451; varied sub nom *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697; *Earl of Norbury v Kitchin* (1866) 15 LT 501; *M'Glone v Smith* (1888) 22 LR Ir 559; Cf *John Young & Co v Bankier Distillery Co* [1893] AC 691, HL; *Roberts v Gwyrfa District Council* [1899] 2 Ch 608, CA.

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NOTE 2--See also *Tamames Ltd v Fairpoint Properties Ltd (No2)* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/154. Injunction.

154. Injunction.

The principles upon which the court will act in granting an injunction, or damages in lieu of or in addition to an injunction, are discussed elsewhere in this work¹. Broadly speaking an injunction lies where the remedy of damages is insufficient and the court will not compel the claimant to submit to what is virtually a compulsory purchase of his easement by awarding damages for its deprivation². The mere interference with a legal right does not however, of itself entitle the claimant to an injunction, since the court will not necessarily grant an injunction where the wrongful interference is of a temporary or trivial nature³, or where there has been unconscionable delay ('laches') on the claimant's part⁴. It does not follow that an injunction ought to be granted merely because the case is such that substantial damages would be given at law⁵. The court may grant an interim injunction⁶, but the claimant must show a prima facie right to protection⁷.

The court may grant a mandatory injunction either upon the trial of the claim⁸ or upon an interim application⁹. Such an injunction is in the form of an order directing the defendant to do some positive act¹⁰.

A quia timet injunction may in appropriate circumstances be obtained based on an injury by the defendant which is merely threatened or apprehended, although no infringement of the claimant's rights have yet occurred¹¹.

When granting an injunction the court may suspend its operation until some future date¹².

1 See CIVIL PROCEDURE.

2 *Dent v Auction Mart Co* (1866) LR 2 Eq 238 at 246; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 193, HL; *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 316, CA; *Cowper v Laidler* [1903] 2 Ch 337; *Aynsley v Glover* (1874) LR 18 Eq 544; *Smith v Smith* (1875) LR 20 Eq 500 at 505; *Greenwood v Hornsey* (1886) 33 ChD 471 at 477; *Litchfield-Speer v Queen Anne's Gate Syndicate Ltd (No 2)* [1919] 1 Ch 407 (declaration of plaintiff's right with liberty to apply for injunction); *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475, CA. The 'plaintiff' is now generally known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 *Coulson v White* (1743) 3 Atk 22; *A-G v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304 at 322; *Smith v Smith* (1875) LR 20 Eq 500 at 501; *Cowper v Laidler* [1903] 2 Ch 337. See also *Davis v Marrable* [1913] 2 Ch 421; and *Lotus Ltd v British Soda Co Ltd* [1972] Ch 123, [1971] 1 All ER 265; *Lyme Valley Squash Club Ltd v Newcastle-under-Lyme Borough Council* [1985] 2 All ER 405 (reduction of light caused by proposed works would not seriously affect the beneficial use of the club or its value; a case for damages in lieu). Exceptionally, the court may grant a declaration that the dominant owner has no right to an injunction to prevent the servient owner from realigning a right of way: see *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 3 All ER 437, [1998] 1 WLR 1749; and PARA 179 the text and note 11 post.

4 *Robson v Whittingham* (1866) 1 Ch App 442; *A-G v Grand Junction Canal Co* [1909] 2 Ch 505 (injunction refused because of laches, although statutory offence proved); *Cory v City of London Real Property Co Ltd* (1954) 163 Estates Gazette 514 (ancient lights; injunction granted); *Jones v Jones* (1954) 163 Estates Gazette 576 (ancient lights; damages awarded, mandatory injunction refused; laches on part of plaintiff); *Abingdon Corp v James* [1940] Ch 287, [1940] 1 All ER 446 (building over water main; mandatory injunction granted, suspended 12 months). See also CIVIL PROCEDURE. As to unconscionable delay ('laches') see EQUITY vol 16(2) (Reissue) PARA 910 et seq.

5 See the cases cited in para 152 notes 4-5 ante.

6 Supreme Court Act 1981 s 37(1).

7 *Challender v Royle* (1887) 36 ChD 425, CA.

8 *Myers v Catterson* (1889) 43 ChD 470, CA; *Dicker v Popham, Radford & Co* (1890) 63 LT 379; *Lawrence v Horton* (1890) 62 LT 749; *Greenwood v Hornsey* (1886) 33 ChD 471; *Smith v Smith* (1875) LR 20 Eq 500; *Krehl v Burrell* (1878) 7 ChD 551 (on appeal (1879) 11 ChD 146, CA); *Parker v WF Stanley & Co Ltd* (1902) 50 WR 282 at 284; *Durell v Pritchard* (1865) 1 Ch App 244; *Deakins v Hookings* [1994] 1 EGLR 190, [1994] 14 EG 133, Mayor's and City of London Court. Cf *City of London Brewery Co v Tennant* (1873) 9 Ch App 212.

9 *Daniel v Ferguson* [1891] 2 Ch 27, CA; *Von Joel v Hornsey* [1895] 2 Ch 774, CA. See CIVIL PROCEDURE vol 11 (2009) PARA 378.

10 *Jackson v Normanby Brick Co* [1899] 1 Ch 438, CA. For cases where mandatory injunctions to remove obstructions to light have been granted see *Smith v Smith* (1875) LR 20 Eq 500; *Myers v Catterson* (1889) 43 ChD 470, CA; *Daniel v Ferguson* [1891] 2 Ch 27, CA; *Dicker v Popham, Radford & Co* (1890) 63 LT 379; *Shiel v Godfrey & Co* [1893] WN 115; *Von Joel v Hornsey* [1895] 2 Ch 774, CA; *Kine v Jolly* [1905] 1 Ch 480, CA; affd sub nom *Jolly v Kine* [1907] AC 1, HL, where, however, the Court of Appeal held that the remedy ought to be damages. See also *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; *Kelk v Pearson* (1871) 6 Ch App 809; *Smith v Day* (1880) 13 ChD 651, CA; *Baxter v Bower* (1875) 23 WR 805; *Lawrence v Horton* (1890) 62 LT 749; *Gaskin v Balls* (1879) 13 ChD 324, CA; *Webster v Whewall* (1880) 42 LT 868. See *Barnes v Allen* (1927) 64 L Jo 92 (mandatory injunction refused in absence of freeholder of servient tenement); *Abingdon Corp v James* [1940] Ch 287, [1940] 1 All ER 446. For forms of injunction see Court Forms.

11 See *Redland Bricks Ltd v Morris* [1970] AC 652, [1969] 2 All ER 576, HL, and CIVIL PROCEDURE vol 11 (2009) PARA 365. Eg quia timet injunctions were granted in *Dicker v Popham, Radford & Co* (1890) 63 LT 379 and *Goodhart v Hyett* (1883) 25 ChD 182 but refused in *Fletcher v Bealey* (1885) 28 ChD 688.

12 *A-G v Colney Hatch Lunatic Asylum* (1868) 4 Ch App 146; cf *A-G v Birmingham Borough Council* (1858) 4 K & J 528 at 547-548; *Abingdon Corp v James* [1940] Ch 287, [1940] 1 All ER 446 (see note 4 supra). As to the power to impose conditions see the Supreme Court Act 1981 s 37(2).

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NOTE 2--As to the approach of the court when considering the circumstances in which a remedy in damages is insufficient, see *Regan v Paul Properties Ltd* [2006] EWCA Civ 1319, [2007] 4 All ER 48.

NOTES 6, 12--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force on 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/4. DISTURBANCE OF EASEMENTS/(2) REMEDIES FOR INTERFERENCE/155. County court jurisdiction.

155. County court jurisdiction.

County courts have jurisdiction to try any claim¹ in which the title to any easement comes in question², whatever the amount involved in the proceedings and whatever the value of any fund or asset connected with the proceedings³.

A county court's power to grant injunctions, whether interim or final, is discussed elsewhere in this work⁴.

1 The statutory wording is 'action': but see CIVIL PROCEDURE vol 11 (2009) PARA 18.

2 See the County Courts Act 1984 s 21(2) (as amended); and COURTS vol 10 (Reissue) PARA 715.

3 See the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(l); and COURTS vol 10 (Reissue) PARA 715.

4 See COURTS vol 10 (Reissue) PARA 711; CIVIL PROCEDURE vol 11 (2009) PARA 315 et seq.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(i) Definition and Nature/156. Meaning of 'right of way'.

5. PARTICULAR EASEMENTS

(1) RIGHTS OF WAY

(i) Definition and Nature

156. Meaning of 'right of way'.

A private right of way may be defined as a right to utilise the servient tenement as a means of access to or egress from¹ the dominant tenement for some purpose connected with the enjoyment of the dominant tenement, according to the nature of that tenement². A right of way can validly be made appurtenant to land with which the way has no physical contiguity, but it must be beneficial in respect of the occupation of that land³.

A pedestrian right of way will not necessarily extend to a right of vehicle use⁴.

1 A right to use a pleasure ground or park may, however, be granted as a valid easement: see *Re Ellenborough Park, Re Davies, Powell v Maddison*[1956] Ch 131 at 153, [1955] 3 All ER 667, CA, and the cases cited in para 158 note 1 post.

2 For judicial dicta from which the nature of a private right of way may best be gathered see *Ballard v Dyson* (1808) 1 Taunt 279; *Cannon v Villars*(1878) 8 ChD 415. As to rights of way arising by virtue of the Leasehold Reform Act 1967 s 10(3) see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1454.

3 *Todrick v Western National Omnibus Co Ltd*[1934] Ch 561, CA; applied in *Pugh v Savage*[1970] 2 QB 373, [1970] 2 All ER 353, CA.

4 See eg *Denty v Hussein* [1999] 24 LS Gaz R 40, [1999] All ER (D) 549.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(i) Definition and Nature/157. Classification of ways.

157. Classification of ways.

The classification of private rights of way which was formerly regarded as of importance is now of no practical utility¹. There are no exact categories under one or other of which every private right of way must fall, as was formerly supposed². The nature and extent of the right depends upon all the circumstances of each particular case, and the former rigid classifications no longer suit the various kinds of ways as they are now regarded by our law.

1 Coke says there are three kinds of ways 'in our ancient books. First, a footway, which is called iter. ... The second is a footway and horseway, which is called actus ab agendo; and this vulgarly is called packe and prime way, because it is both a footway, which was the first or prime way, and a packe or driftway also. The third is via or aditus, which contains the other two, and also a cart, etc.': Co Litt 56a. A carriageway includes a footway: *Davies v Stephens* (1836) 7 C & P 570.

2 *Ballard v Dyson* (1808) 1 Taunt 279 at 284 per Mansfield CJ.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(i) Definition and Nature/158. General rights of way.

158. General rights of way.

The distinction between general and limited rights of way is still of some importance¹. The term 'general right of way' is applied to private rights of way upon which there are no restrictions other than the necessary qualifications which nature or the law requires with regard to all private rights of way. The term is misleading in that it is more applicable to a public highway for all kinds of traffic² than to a private right of way, which is necessarily qualified by law in several respects, for all private rights of way, no matter how general they may be, can only be used by the owners and occupiers of the dominant tenement and their licensees³, and only for some purpose connected with the dominant tenement⁴. Also, in the great majority of cases, they may only be used for the purposes of the dominant tenement as that tenement existed at the time of the creation of the easement⁵. In this respect the scope of an easement may be wider on the construction of an express grant creating it than measured by the actual user where it arises by prescription⁶.

The true significance of the term 'general right of way' lies in its use in contradistinction to the special limitations expressed or inferred upon the user of any particular right of way over and above the limitations thus imposed by the general law. Thus, special limitation may be placed upon the user in respect of time; for instance, the user may be limited to certain times in the day⁷, to certain seasons⁸ or periods⁹ or to the duration of the purposes for which it was created¹⁰. It may be limited also in respect of the part of the area of the servient tenement over which it may be exercised¹¹. Another and the most common form of limitation is in respect of the mode in which the way may be used, that is to say, in respect of the nature of the traffic¹². In this respect it may be limited to foot passengers¹³, to motor traffic¹⁴, to carriages and wheeled traffic, excluding cattle and other animals¹⁵, to agricultural traffic¹⁶, to persons driving cattle and other animals¹⁷, or to traffic of some other particular nature¹⁸. The user of the way may also be limited in respect of its special purposes¹⁹ or of the persons who are entitled to use it²⁰.

The dominant owner is limited in his user to the exact width of the way²¹.

1 *Cowling v Higginson* (1838) 4 M & W 245 at 256; *United Land Co v Great Eastern Rly Co* (1875) 10 Ch App 586 at 590; *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362 at 371, CA. As to rights of way in favour of parishioners to and from the parish church see *Thrower's Case* (1672) 1 Vent 208; *Batten v Gedye* (1889) 41 ChD 507; *Brocklebank v Thompson* [1903] 2 Ch 344; *Farquhar v Newbury RDC* [1908] 2 Ch 586; affd [1909] 1 Ch 12, CA; 4 Bac Abr (7th Edn) 215; 3 Cru Dig (4th Edn) 85. As to rights of way for perambulations see *Goodey v Michell* (1595) Cro Eliz 441; *Taylor v Devey* (1837) 7 Ad & El 409; *Grant v Kearney* (1823) 12 Price 773; *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131, [1955] 3 All ER 667, CA. As to rights of way in favour of parishioners or inhabitants of specific districts for obtaining water see *Manning v Wasdale* (1836) 5 Ad & El 758; *Race v Ward* (1855) 4 E & B 702; *Smith v Archibald* (1880) 5 App Cas 489, HL; and cf *Boteler v Bristow* (1475) YB 15 Edw 4, fo 29, A, pl 7; *Weekly v Wildman* (1698) 1 Ld Raym 405 at 407; *Harrop v Hirst* (1868) LR 4 Exch 43. As to customary rights of way generally see CUSTOM AND USAGE vol 12(1) (Reissue) PARAS 636-640. Cf generally *Abercromby v Fermoy Town Comrs* [1900] 1 IR 302.

2 Highways may be limited to particular kinds of traffic: see HIGHWAYS, STREETS AND BRIDGES.

3 See PARA 173 post.

4 *Harris v Flower* (1904) 74 LJ Ch 127, CA; *Skull v Glenister* (1864) 16 CBNS 81; *Williams v James* (1867) LR 2 CP 577; *Lawton v Ward* (1696) 1 Ld Raym 75; *Howell v King* (1674) 1 Mod Rep 190; *Finch v Great Western Rly Co* (1879) 5 ExD 254.

5 See eg *Bayley v Great Western Rly Co* (1883) 26 ChD 434, CA; *Cousens v Rose* (1871) LR 12 Eq 366; *RPC Holdings Ltd v Rogers* [1953] 1 All ER 1029 (way for all purposes by prescription at common law surcharged when used for purposes substantially different from original agricultural use); *British Railways Board v Glass* [1965] Ch 538, [1964] 3 All ER 418, CA; and see PARA 56 ante, para 161 et seq post. Cf *Finch v Great Western Rly Co* (1879) 5 ExD 254; *United Land Co v Great Eastern Rly Co* (1875) 10 ChD 586; but see PARA 163 post.

6 *Kain v Norfolk* [1949] Ch 163, [1949] 1 All ER 176. See also PARA 162 post.

7 See *Collins v Slade* (1874) 23 WR 199, where a right of way was created which was only to be used in the daytime.

8 Instances of rights of way limited to particular seasons of the year are to be found in cases dealing with the tithe owner's right of carrying away the tithe: see eg *Payne v Brigham* (1685) 2 Lut 1313; *Shapcott v Mugford* (1697) 1 Ld Raym 187; *James v Dods* (1833) 2 Cr & M 266.

9 *Hollins v Verney* (1884) 13 QBD 304, CA, where a right of way was claimed for carting away felled timber at intervals recurring about every 12 years.

10 *Ardley v St Pancras Guardians* (1870) 39 LJ Ch 871.

11 See *Clifford v Hoare* (1874) LR 9 CP 362; *Wood v Stourbridge Rly Co* (1864) 16 CBNS 222; *Cousens v Rose* (1871) LR 12 Eq 366. Cf *Knox v Sansom* (1877) 25 WR 864; *FC Strick & Co Ltd v City Offices Co Ltd* (1906) 22 TLR 667.

12 See eg *Jackson v Stacey* (1816) Holt NP 455; *Marquis of Stafford v Coyney* (1827) 7 B & C 257; *Ward (Helston) Ltd v Kerrier District Council* [1984] RVR 18, Lands Tribunal (right of way limited to use for vehicular access to slaughterhouse).

13 See eg *Cousens v Rose* (1871) LR 12 Eq 366; *Brunton v Hall* (1841) 1 QB 792.

14 User of the way authorised expressly to be by carriage traffic ordinarily includes motor traffic: see *A-G v Hodgson* [1922] 2 Ch 429; *White v Grand Hotel, Eastbourne Ltd* [1913] 1 Ch 113 at 116, CA (affd sub nom *Grand Hotel, Eastbourne Ltd v White* 84 LJ Ch 938, HL); *Lock v Abercester Ltd* [1939] Ch 861, [1939] 3 All ER 562; and cf *Kain v Norfolk* [1949] 1 Ch 163, [1949] 1 All ER 176.

15 *Ballard v Dyson* (1808) 1 Taunt 279; applied in *White v Richards* [1993] RTR 318, 68 P & CR 105, CA (right of use with motor vehicles held to include horse-drawn carriages and carts, and use of track by horses, whether ridden or led, and right to lead, but not to drive, cows and other animals).

16 *Cowling v Higginson* (1838) 4 M & W 245; *Bradburn v Morris* (1876) 3 ChD 812, CA; *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362, CA; *RPC Holdings Ltd v Rogers* [1953] 1 All ER 1029.

17 *Brunton v Hall* (1841) 1 QB 792.

18 *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940, Ex Ch; *Ward (Helston) Ltd v Kerrier District Council* [1984] RVR 18, Lands Tribunal (right of way limited to use for vehicular access to slaughterhouse).

19 *Higham v Rabett* (1839) 5 Bing NC 622; *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362, CA; *Bradburn v Morris* (1876) 3 ChD 812, CA; *Cowling v Higginson* (1838) 4 M & W 245 at 256 per Lord Abinger CB.

20 See eg *Brunton v Hall* (1841) 1 QB 792. Cf however *Baxendale v North Lambeth Liberal and Radical Club Ltd* [1902] 2 Ch 427.

21 *Minor v Groves* (1997) 80 P & CR 136, (1997) Times, 20 November, CA.

UPDATE

158 General rights of way

NOTES 12, 16--See *Thompson v Bee* [2009] EWCA Civ 1212, [2010] WTLR 357, [2009] All ER (D) 223 (Nov).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(i) Definition and Nature/159. Use of way by owner.

159. Use of way by owner.

The owner of a right of way cannot in general use the way for the service of tenements other than the dominant tenement, that is to say, he cannot use the way to go to the dominant tenement, and from there to a point beyond¹; or to go to points between the servient and the dominant tenement². Moreover, it has been said that he must enter the private way at the usual and accustomed part³.

The general rule that a right of way established for the benefit of Whiteacre cannot be used for the benefit of both it and Blackacre is not, however, absolute. The critical question is whether the use made of Blackacre was more than merely ancillary to that made of Whiteacre. Thus on the one hand a right of way to access and cultivate the dominant land has been held not to entitle the dominant owner to use the way to access and cultivate land adjoining the dominant land⁴; and a vehicular right of way giving access to set down and pick up passengers has been held not to give a right of way for parking on adjacent land which was not part of the dominant tenement⁵. On the other hand the owner of a right of way has been held entitled to use the way for access to land near the dominant tenement where access to that land was ancillary to the enjoyment of the dominant tenement⁶; and where two rooms had been added to the dominant tenement it was held that, in so far as the use of the way served the additional two rooms, that use could only be described as ancillary to its use for the purposes of the original dominant tenement⁷.

1 *Howell v King* (1674) 1 Mod Rep 190; *Bradburn v Morris* (1876) 3 ChD 812, CA; *Finch v Great Western Ry Co* (1879) 5 ExD 254; *Skull v Glenister* (1864) 16 CBNS 81; *Dand v Kingscote* (1840) 6 M & W 174; *Lawton v Ward* (1696) 1 Ld Raym 75; *Williams v James* (1867) LR 2 CP 577; *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362, CA; *Harris v Flower* (1904) 74 LJ Ch 127 at 132, CA, per Romer LJ ('If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B'). *Harris v Flower* supra was distinguished in *Britel Developments (Thatcham) Ltd v Nightfreight (Great Britain) Ltd* [1998] 4 All ER 432 where it was held that a right of way granted for the benefit of land is capable of being exercised for the purpose of constructing works on part of that land intended to benefit other land. See also PARA 56 ante.

2 See *Senhouse v Christian* (1787) 1 Term Rep 560 at 569; *Henning v Burnet* (1852) 8 Exch 187. See also *Callard v Beeney* [1930] 1 KB 353 at 359 per Talbot J.

3 *Woodyer v Hadden* (1813) 5 Taunt 125 at 132 per Chambre J; but see *South Metropolitan Cemetery Co v Eden* (1855) 16 CB 42. The rule is different in the case of highways: *Marshall v Ulleswater Steam Navigation Co* (1871) LR 7 QB 166 at 172; *Berridge v Ward* (1860) 2 F & F 208; *Berridge v Ward* (1861) 10 CBNS 400.

4 *Peacock v Custins* [2001] 2 All ER 827, [2002] 1 WLR 1815, CA; *National Trust for Places of Historic Interest or Natural Beauty v White* [1987] 1 WLR 907, 131 Sol Jo 915 (owner of dominant tenement not entitled to increase the burden on the servient tenement so as to include land to which the right of way was not appurtenant); *Alvis v Harrison* (1991) 62 P & CR 10, 1991 SLT 64, HL (a Scottish appeal which was, however, said to apply equally to English law).

5 *Das v Linden Mews Ltd* [2002] EWCA Civ 590, [2003] 2 P & CR 58, sub nom *Chand v Linden Mews Ltd* [2002] All ER (D) 09 (May).

6 *National Trust for Places of Historic Interest or Natural Beauty v White* [1987] 1 WLR 907, 131 Sol Jo 915 (right of way providing access to site of archaeological interest could also be used, by visitors to the site, for access to a car park on adjoining land before walking to the site; but no right to use the car park for an independent purpose such as picnicking).

7 *Massey v Boulden* [2002] EWCA Civ 1634, [2003] 2 All ER 87, [2003] 1 WLR 1792.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(i) Definition and Nature/160. Coexistent private way and highway.

160. Coexistent private way and highway.

A private right of way and a highway may coexist over the same road¹, and the acquisition by the public of a highway over a road in respect of which a private individual enjoys a right of way does not necessarily destroy the latter's easement². The extinguishment of the public right of way does not necessarily extinguish the private right³.

1 *Brownlow v Tomlinson* (1840) 1 Man & G 484 at 486; *R v Chorley* (1848) 12 QB 515; *A-G v Esher Linoleum Co Ltd* [1901] 2 Ch 647; *Walsh v Oates* [1953] 1 QB 578, [1953] 1 All ER 963, CA.

2 *Duncan v Louch* (1845) 6 QB 904 at 915; *R v Chorley* (1848) 12 QB 515.

3 *Wells v London, Tilbury and Southend Rly Co* (1877) 5 ChD 126, CA; *Walsh v Oates* [1953] 1 QB 578, [1953] 1 All ER 963; and see PARA 42 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(ii) Rights of Way created by Express Grant/161. Nature and extent of express grant.

(ii) Rights of Way created by Express Grant

161. Nature and extent of express grant.

If a right of way is claimed under an express grant which is actually existing, the nature and extent of the right depends upon the proper construction of the instrument creating it¹. It is for the court to put the true construction upon the words used in the grant², guided, in the absence of any clear indication of the intention of the parties, by the maxim that a grant must be construed most strongly against the grantor³. The construction of the grant depends on the circumstances surrounding the execution of the instrument⁴. Thus, a grant of a right of way per se and nothing else may be a right of footway or a general right of way or a right to any other kind of way, according to the circumstances of the case⁵. Among these circumstances the nature and description of the land or buildings comprising the dominant tenement⁶, and the nature of the place over which the right is granted as it existed at the date of the grant⁷, are always very material considerations. A right of way cannot be extended to include the use of the way for the purpose of benefiting any property where this has not been expressly set out by the terms of the grant⁸. The claimant may have to be satisfied with a reduced right of way when the physical features of the land so determine⁹.

Where a transfer of land which includes the grant of a right of way reserves to the grantor a power to alter the right of way, that reservation is to be construed, bearing in mind the other provisions of the transfer and the factual matrix of the background of the case, so as to give effect to the business sense and the character of the grant of that right of way¹⁰.

A right of way may be created by statute¹¹.

1 *Williams v James*(1867) LR 2 CP 577 at 581; *United Land Co v Great Eastern Rly Co*(1875) 10 Ch App 586 at 590; *Cannon v Villars*(1878) 8 ChD 415 at 420; *New Windsor Corpn v Stovell*(1884) 27 ChD 665 at 672; *Brunton v Hall*(1841) 1 QB 792; *Wood v Stourbridge Rly Co* (1864) 16 CBNS 222; *Milner's Safe Co Ltd v Great Northern and City Rly Co*[1907] 1 Ch 208 at 220; *Kain v Norfolk*[1949] Ch 163, [1949] 1 All ER 176; *Minor v Groves* (1997) 80 P & CR 136, (1997) Times, 20 November, CA. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 10, 235. The general words incorporated by the Law of Property Act 1925 s 62 in every conveyance not expressing a contrary intention will pass to the purchaser all ways actually used by him at the date of the conveyance, though used only by permission of the vendor: *International Tea Stores Co v Hobbs*[1903] 2 Ch 165 (purchase of house previously leased). As to identification of the dominant tenement and the admissibility of extrinsic evidence see PARA 12 note 1 ante. See also PARA 56 ante.

2 *Callard v Beeney*[1930] 1 KB 353; *Williams v James*(1867) LR 2 CP 577 at 581; *Osborn v Wise* (1837) 7 C & P 761; *Cousens v Rose*(1871) LR 12 Eq 366; *Watts v Kelson*(1871) 6 Ch App 166; *Wood v Stourbridge Rly Co* (1864) 16 CBNS 222. See *Scott v Martin*[1987] 2 All ER 813, [1987] 1 WLR 841, CA (planning permission and plan annexed to conveyance containing right of way were admissible in determining extent of right of way); *Charles v Beach* [1993] NPC 102, [1993] EGCS 124, CA (transient obstruction held not to override words of grant).

3 *Williams v James*(1867) LR CP 577 at 581 per Willes J; *New Windsor Corpn v Stovell*(1884) 27 ChD 665 at 673; *Morris v Edgington* (1810) 3 Taunt 24 at 30 per Lord Mansfield CJ; *Allan v Gomme* (1840) 11 Ad & El 759.

4 *Cannon v Villars*(1878) 8 ChD 415 at 420 per Jessel MR; *Newcomen v Coulson*(1877) 5 ChD 133, CA; *Keefe v Amor*[1965] 1 QB 334, [1964] 2 All ER 517, CA; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)*[1975] 1 All ER 772, [1975] 1 WLR 468, CA; *White v Richards* [1993] RTR 318, 68 P & CR 105, CA; *West v Sharp* (1999) 79 P & CR 327, CA; and see PARAS 12 note 1, 56 ante. See also *Partridge v Lawrence*[2003] All ER (D) 133 (Jul). As to the proper method of construction of a grant of a right of way see *Russell v Finn*[2003] EWCA Civ 399, [2003] All ER (D) 288 (Feb); and see eg *Chelverton Residential Ltd v Flower*[2002] EWHC 2378 (Ch), [2002] All ER (D) 144 (Oct); *Newby v MIW Holdings Ltd*[2002] EWHC 711 (Ch), [2002] All ER (D) 108 (Jan).

5 *Cannon v Villars*(1878) 8 ChD 415.

6 *Bracewell v Appleby*[1975] Ch 408, [1975] 1 All ER 993; *United Land Co v Great Eastern Rly Co*(1875) 10 Ch App 586 at 590 per Mellish LJ; *Allan v Gomme* (1840) 11 Ad & El 759 at 772 per Lord Denman CJ; *Harris v Flower* (1904) 74 LJ Ch 127, CA; *Peacock v Custins*[2001] 2 All ER 827, [2002] 1 WLR 1815, CA (a right of way cannot be extended to include the use of the way for the purpose of benefiting any property where this has not been expressly set out by the terms of the grant).

7 *Cannon v Villars*(1878) 8 ChD 415 at 420 per Jessel MR.

8 *Peacock v Custins*[2001] 2 All ER 827, [2002] 1 WLR 1815, CA.

9 *Wesleyvale Ltd v Harding Homes (East Anglia) Ltd*[2003] All ER (D) 58 (Sep).

10 *Windmill Pine Ltd v Lincoln Industries Group Ltd*[2001] All ER (D) 176 (Jun).

11 See PARA 47 ante. As to whether a right of way over such reasonable route 'as might from time to time be agreed' extended to the construction of an access road pursuant to a planning obligation under the Town and Country Planning Act 1990 s 106 (as substituted) see *Essex County Showground Ltd v Lyons*[2002] All ER (D) 36 (Jun).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(ii) Rights of Way created by Express Grant/162. Extent of rights of way granted.

162. Extent of rights of way granted.

It is a question of construction whether the right granted is a right of way by the means of access existing at the date of the grant¹ or is a right of way to or from any point of the boundary of the dominant tenement². A grant of a right of way to a building used as a factory, or for the purposes of any other business which would require heavy weights or bags or packages to be brought to it, *prima facie* includes a right to use the way for reasonable purposes sufficient for the purposes of the business, including usually the right to bring up lorries and vans at reasonable times³ and the right to stop⁴. A grant of a right of way to a dwelling house *prima facie* amounts to a grant of a right of way for all reasonable purposes required for the dwelling house, and would include the right to the user of cars by the dominant owner to set down or pick up passengers, or a right to have a van draw up to the door to load or unload goods⁵, but not necessarily a right to park a car or other vehicle on the carriageway outside the door⁶. An easement of way does not extend to passage of sewage though pipes laid along the route of the way⁷.

If a grant is made of a right of way over a road which is at the time of the grant a metalled road with a pavement on each side, the presumption is that it was intended to be used for foot passengers, motor vehicles and general traffic, being the purpose for which it was obviously constructed. So also a grant of a right of way along a piece of land capable of being used for the passage of cars, to a place which is stated on the face of the grant to be intended to be used for a purpose necessarily or reasonably requiring the passing of cars, must be intended to be effectual for the purpose for which the place was designed to be used, or was actually used at the time of the grant⁸.

A servient owner has no right to alter the route of an easement of way unless such a right is an express or implied term of the grant of the easement or is subsequently conferred on him⁹.

1 *Henning v Burnet* (1852) 8 Exch 187. Cf *McKay Securities plc v Surrey County Council* [1998] EGCS 180, [1998] All ER (D) 710.

2 *South Metropolitan Cemetery Co v Eden* (1855) 16 CB 42; *Cooke v Ingram* (1893) 68 LT 671; *Sketchley v Berger* (1893) 69 LT 754; *Pettey v Parsons* [1914] 2 Ch 653, CA; *Earl of Guilford v St George's Golf Club Trust Ltd* (1916) 85 LJ Ch 664; *Lomax v Wood* [2001] EWCA Civ 1099, [2001] All ER (D) 80 (Jun).

3 *Cannon v Villars* (1878) 8 ChD 415 at 421 per Jessel MR; *Bulstrode v Lambert* [1953] 2 All ER 728, [1953] 1 WLR 1064; *Bye v Marshall* [1993] CLY 1627, Portsmouth county court. The older cases, of course, refer to horse-drawn traffic; as to the construction of such references so as to include motor vehicles see PARA 158 note 14 ante.

4 *McIlraith v Grady* [1968] 1 QB 468, [1967] 3 All ER 625, CA (right of post office van to stop at sub-post office to load and unload). However in *London and Suburban Land and Building Co (Holdings) Ltd v Carey* (1991) 62 P & CR 480 it was held that the right to pass and repass with vehicles did not give a right to halt vehicles en route to load/unload goods or set down/pick up passengers.

5 *Cannon v Villars* (1878) 8 ChD 415 at 420-421; *Keefe v Amor* [1965] 1 QB 334, [1964] 2 All ER 517, CA (right held to extend to all vehicular traffic). See also *Newcomen v Coulson* (1877) 5 ChD 133, CA; *National Trust for Places of Historic Interest or Natural Beauty v White* [1987] 1 WLR 907, 131 Sol Jo 915.

6 *Das v Linden Mews Ltd* [2002] EWCA Civ 590, [2003] 2 P & CR 58, sub nom *Chand v Linden Mews Ltd* [2002] All ER (D) 09 (May).

7 *Penn v Wilkins* (1974) 236 Estates Gazette 203.

8 *Cannon v Villars* (1878) 8 ChD 415 at 420 per Jessel MR.

9 *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 3 All ER 437, [1998] 1 WLR 1749.

UPDATE

162 Extent of rights of way granted

NOTE 9--See also *Heslop v Bishton* [2009] EWHC 607 (Ch), [2009] 2 P & CR D25.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(ii) Rights of Way created by Express Grant/163. When grant is restricted to purposes existing at date of grant.

163. When grant is restricted to purposes existing at date of grant.

The natural tendency is to construe a grant of a right of way as conferring per se only the right to use the way for the purposes for which it would be ordinarily used at the time of the grant¹. If the grant is so worded as expressly to give the fullest rights of user to the dominant owner, however, the grant is not restricted to access for the purposes for which it would be required at the time of the grant². Thus, if a right of way is granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered³. A deed of grant containing the words 'as at present enjoyed' has been held to restrict the grantee to using the same type of locomotion over the way as he used at the time of the grant, but not to restrict him as to the quantity of the user⁴.

1 *Great Western Rly Co v Talbot* [1902] 2 Ch 759, CA; *Taff Vale Rly Co v Gordon Canning* [1909] 2 Ch 48; *Allan v Gomme* (1840) 11 Ad & El 759; *Henning v Burnet* (1852) 8 Exch 187; *Brunton v Hall* (1841) 1 QB 792; *Todrick v Western National Omnibus Co* [1934] Ch 190 at 206 (revsd, but not on this point, [1934] Ch 561; and distinguished in *Robinson v Bailey* [1948] 2 All ER 791, CA); *Jelbert v Davis* [1968] 1 All ER 1182, [1968] 1 WLR 589, CA (applied in *White v Richards* [1993] RTR 318, 68 P & CR 105, CA); and see PARA 158 ante. See also *TRH Sampson Associates Ltd v British Railways Board* [1983] 1 All ER 257, [1983] 1 WLR 170.

2 *Finch v Great Western Rly Co* (1879) 5 ExD 254 at 261; *United Land Co v Great Eastern Rly Co* (1875) 10 Ch App 586; *South Eastern Rly Co v Cooper* [1924] 1 Ch 211, CA; *Lloyds Bank v Dalton* [1942] Ch 466, [1942] 2 All ER 352; *Kain v Norfolk* [1949] 1 All ER 176; *Keefe v Amor* [1965] 1 QB 334, [1964] 2 All ER 517, CA; *British Railways Board v Glass* [1965] Ch 538, [1964] 3 All ER 418, CA; *Woodhouse & Co Ltd v Kirkland (Derby) Ltd* [1970] 2 All ER 587, [1970] 1 WLR 1185; *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P & CR 978; and see PARA 56 ante, and, in particular, *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993.

3 *Henning v Burnet* (1852) 8 Exch 187 at 192 per Parke B; *Grand Hotel, Eastbourne Ltd v White* (1913) 84 LJ Ch 938, HL.

4 See *Hurt v Bowmer* [1937] 1 All ER 797. Contrast *McKay Securities plc v Surrey County Council* [1998] EGCS 180, [1998] All ER (D) 710.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(iii) Rights of Way arising by Implication of Law/164. Implied rights of way.

(iii) Rights of Way arising by Implication of Law

164. Implied rights of way.

A right of way may arise by implication of law¹ where both dominant and servient tenements have been in the common ownership of one person and he has disposed of one or other of the tenements². Rights of way thus arising are either rights of way reasonably necessary for the comfortable occupation of the dominant tenement, which only arise upon a grant of the dominant tenement by virtue of an implied grant or words implied in the grant by statute³, or rights of way of necessity⁴.

1 See PARA 63 et seq ante; and see *Pwllbach Colliery Co Ltd v Woodman*[1915] AC 634 at 646-647, HL; *Horn v Hiscock* (1972) 223 Estates Gazette 1437.

2 *Bayley v Great Western Rly Co*(1883) 26 ChD 434 at 452-453, CA. For a case of a right of way arising by implication of law see *Milner's Safe Co Ltd v Great Northern and City Rly Co*[1907] 1 Ch 208; affd [1907] 1 Ch 229, CA. As to a right of way arising by implication in a deed of exchange see *Mobil Oil Co Ltd v Birmingham City Council*[2001] EWCA Civ 1608, [2002] 2 P & CR 186, [2001] All ER (D) 29 (Nov).

3 See PARA 63 et seq ante.

4 *Wheeldon v Burrows*(1879) 12 ChD 31 at 49, CA; *Union Lighterage Co v London Graving Dock Co*[1902] 2 Ch 557 at 572-573, CA; *Pheysey v Vicary* (1847) 16 M & W 484 at 495 per Parke B; *Aldridge v Wright*[1929] 2 KB 117, CA. As to ways of necessity see PARAS 165-168 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(iii) Rights of Way arising by Implication of Law/165. Right of way of necessity.

165. Right of way of necessity.

A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted to him¹, or over the land of the grantee where the land retained by the grantor is land-locked². Such a way cannot exist over the land of a stranger³. It is an easement without which it is impossible to make any use of the dominant tenement⁴. The doctrine which gives rise to a way of necessity is based only upon an implied grant either by a private individual or by Parliament, so that where land has been acquired after 12 years' possession under the Limitation Act 1980⁵, or its predecessors, a way of necessity does not thereby arise⁶. The doctrine is not founded on public policy but on the implication into the document granting the land that the grant of some way was intended because otherwise the land would be inaccessible⁷.

A right of way of necessity can only exist where the implied grantee of the easement has no other means of reaching his land⁸. If there is any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise, for the mere inconvenience of an alternative way will not of itself give rise to a way of necessity⁹. Accordingly a way of necessity will not be implied where access can be obtained on foot, though not by car¹⁰, or by water¹¹. It is not necessary in order that a way of necessity may arise that the land granted should be completely surrounded by land of the grantor¹² if the land is partly surrounded by land of strangers and abuts upon land of the grantor¹³. In those circumstances the implication is not rebutted by the fact that at the date of the grant of the land there existed a permissive or precarious approach to it over land of a stranger¹⁴. Rights of way of necessity may arise upon a grant of a lease as well as upon a grant in fee¹⁵, and also upon the disposition of the property by will¹⁶.

A way of necessity can arise in favour either of the grantee on a disposition of the dominant tenement¹⁷ or of the grantor on a disposition of the servient tenement¹⁸.

1 *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 323; *Gayford v Moffatt* (1868) 4 Ch App 133 at 135-136; *Brown v Alabaster* (1887) 37 ChD 490; *London Corpn v Riggs* (1880) 13 ChD 798 at 807; *Miller v Hancock* [1893] 2 QB 177 at 180, CA; *Proctor v Hodgson* (1855) 10 Exch 824; *Pearson v Spencer* (1863) 3 B & S 761, Ex Ch; *Pinnington v Galland* (1853) 9 Exch 1; *Pyer v Carter* (1857) 1 H & N 916; *Bullard v Harrison* (1815) 4 M & S 387; *Beaudely v Brook* (1607) Cro Jac 189; *Howton v Frearson* (1798) 8 Term Rep 50. See however *MRA Engineering Ltd v Trimster Co Ltd* (1987) 56 P & CR 1, CA (easement of necessity not implied where access could be obtained on foot but not by car).

2 *Clark v Cogge* (1607) Cro Jac 170; *Staple v Heydon* (1703) 6 Mod Rep 1; *Chichester v Lethbridge* (1738) Willes 71 at 72n; *Pinnington v Galland* (1853) 9 Exch 1; *Davies v Sear* (1869) LR 7 Eq 427. If a right of way over land of a stranger is appurtenant to the land granted this right would pass to the grantee without any express mention of it in the conveyance, and no right of way of necessity would arise. See PARA 66 ante.

3 See *Brown v Alabaster* (1887) 37 ChD 490.

4 *Pheysey v Vicary* (1847) 16 M & W 484 at 495.

5 The period of 12 years mentioned in the text applies to unregistered land, and, before 13 October 2003, applied to registered land in the same manner and to the same extent as it applied to unregistered land, except that where, if the land were unregistered, the estate of the person registered as proprietor would be extinguished, the estate was not extinguished but was deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the Limitation Act 1980, had acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or

interest was not extinguished by the Act: see the Land Registration Act 1925 s 75(1) (repealed). The Land Registration Act 2002 has introduced fundamental changes in the law of adverse possession in so far as it relates to registered land. The relevant provisions of the 2002 Act may be summarised as follows: (1) adverse possession, for however long, will not of itself bar the owner's title to a registered estate (Land Registration Act 2002 s 96); (2) a squatter is entitled to apply to be registered as proprietor after 10 years (rather than 12 years, as previously) and the registered proprietor of the estate, the registered proprietor of any charge over it and certain other persons interested in the land must be notified of the application (see s 97, Sch 6 paras 1, 2); (3) if the application is not opposed the squatter will be registered as proprietor of the land (see Sch 6 para 4); (4) if it is opposed, the application will be refused, subject to limited exceptions (see Sch 6 para 5); (5) if the application is refused but no steps are taken to evict the squatter or regularise his position and he remains in possession for another two years, he is entitled to reapply to be registered as proprietor and will be so registered whether or not the application is opposed (see Sch 6 paras 6, 7); (6) where the registered proprietor brings proceedings to recover possession from the squatter, he will succeed unless the squatter can establish certain limited exceptions corresponding to those under head (4) supra (see s 98); (7) transitional provisions protect persons who had acquired rights under the Limitation Act 1980 before the coming into force of the Land Registration Act 2002 (s 134(2), Sch 11 paras 7, 11, 18). See further LAND REGISTRATION; LIMITATION PERIODS.

6 *Wilkes v Greenway* (1890) 6 TLR 449, CA.

7 *Nickerson v Barraclough* [1981] Ch 426, [1981] 2 All ER 369, CA.

8 *Proctor v Hodgson* (1855) 10 Exch 824; *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557, CA; *Dodd v Burchell* (1862) 1 H & C 113 at 122; *London Corpn v Riggs* (1880) 13 ChD 798; *Holmes v Goring* (1824) 2 Bing 76; cf *Dand v Kingscote* (1840) 6 M & W 174; *Clark v Cogge* (1607) Cro Jac 170; *Reignolds v Edwards* (1741) Willes 282; and see *Thorburn v Holland* [2002] All ER (D) 220 (Apr) (vehicular access arising on the basis of necessity).

9 *Dodd v Burchell* (1862) 1 H & C 113 at 122; *London Corpn v Riggs* (1880) 13 ChD 798 at 807; *Titchmarsh v Royston Water Co Ltd* (1899) 81 LT 673, where a way of necessity was not allowed, although the only means of access was from a highway in a cutting 20 feet below the land; *Aldridge v Wright* [1929] 2 KB 117, CA, where it was held that the right claimed, a back entrance for emptying rubbish etc, was not a matter of necessity but merely of convenience; *Manjang v Drammeh* (1990) 61 P & CR 194, PC (where land runs along river, no easement of necessity implied as there was alternative means of access to the public highway).

10 *MRA Engineering Ltd v Trimster Co Ltd* (1987) 56 P & CR 1, CA.

11 *Manjang v Drammeh* (1990) 61 P & CR 194, PC.

12 *Gayford v Moffatt* (1868) 4 Ch App 133; *Serff v Acton Local Board* (1886) 31 ChD 679; *Holmes v Goring* (1824) 2 Bing 76. Cf *Titchmarsh v Royston Water Co* (1899) 81 LT 673, where this principle appears to have been overlooked.

13 *Clark v Cogge* (1607) Cro Jac 170; *Brown v Alabaster* (1887) 37 ChD 490 at 500; *Pinnington v Galland* (1853) 9 Exch 1; *Gayford v Moffatt* (1868) 4 Ch App 133; *Holmes v Goring* (1824) 2 Bing 76; *Serff v Acton Local Board* (1886) 31 ChD 679; *Barry v Hasseldine* [1952] Ch 835, [1952] 2 All ER 317.

14 *Barry v Hasseldine* [1952] Ch 835, [1952] 2 All ER 317.

15 *Gayford v Moffatt* (1868) 4 Ch App 133; *Serff v Acton Local Board* (1886) 31 ChD 679 at 684; *Miller v Hancock* [1893] 2 QB 177 at 180, CA.

16 Cf *Pheysey v Vicary* (1847) 16 M & W 484.

17 *Wheeldon v Burrows* (1879) 12 ChD 31, CA; *Howton v Frearson* (1798) 8 Term Rep 50. See generally *Glave v Harding* (1858) 27 LJ Ex 286 at 292; *Hinchliffe v Earl of Kinnoul* (1838) 5 Bing NC 1; *Morris v Edgington* (1810) 3 Taunt 24; *James v Plant* (1836) 4 Ad & El 749, Ex Ch; *Brett v Clowser* (1880) 5 CPD 376; *Watts v Kelson* (1871) 6 Ch App 166 at 172, 174; *Ford v Metropolitan and Metropolitan District Rly Companies* (1886) 17 QBD 12, CA; *Thomas v Owen* (1887) 20 QBD 225, CA; *Aldridge v Wright* [1929] 2 KB 117, CA; and see PARA 63 et seq ante.

18 *London Corpn v Riggs* (1880) 13 ChD 798 (way of necessity reserved in favour of grantor); and see PARA 68 ante.

UPDATE

165 Right of way of necessity

NOTE 7--See *Sweet v Sommer* [2005] EWCA Civ 227, [2005] All ER (D) 162 (Mar).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(iii) Rights of Way arising by Implication of Law/166. Extent of way of necessity.

166. Extent of way of necessity.

The extent and nature of the right of way depends upon the nature of the necessity¹. The purposes for which it may be used depend upon the facts existing at the time of the grant which gave rise to the necessity², and are in general controlled by the obvious intention of the grant³. If a way of necessity arises upon a demise, and the lease contemplates the carrying on of a particular business upon the demised premises, the way of necessity is confined to a way suitable for that business⁴.

1 *Gayford v Moffatt* (1868) 4 Ch App 133; *Holmes v Goring* (1824) 2 Bing 76; *London Corpn v Riggs* (1880) 13 ChD 798; *James v Dods* (1833) 2 Cr & M 266.

2 *Gayford v Moffatt* (1868) 4 Ch App 133; *London Corpn v Riggs* (1880) 13 ChD 798 at 806, 807; *Serff v Acton Local Board* (1886) 31 ChD 679, where a way of necessity arising upon the grant of land to a local authority to be used as sewage works was held to be a way for all necessary purposes in connection with the sewage works. See also *Maguire v Browne* [1921] 1 IR 148, CA (claim to use path to antiquarian moat for carting timber); *affd sub nom Browne v Maguire* [1922] 1 IR 23, HL.

3 See eg *Serff v Acton Local Board* (1886) 31 ChD 679 at 684-685; *London Corpn v Riggs* (1880) 13 ChD 798.

4 *Gayford v Moffatt* (1868) 4 Ch App 133.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(iii) Rights of Way arising by Implication of Law/167. Who may select the way of necessity.

167. Who may select the way of necessity.

Where a way of necessity arises the grantor or person who creates the way is entitled to choose the actual part of the servient tenement over which the way is to be used¹, but the way he selects must be convenient for the grantee². The grantor has the right of selection whether the way of necessity arises in the grantee's favour³, or in his own favour over the land granted away⁴. Once selected, whether by the grantor or the grantee, a way of necessity cannot be altered⁵. The grantee of land cannot have two ways of necessity⁶, nor can he insist as of right to have the way which is the most convenient for himself, for a way of necessity does not necessarily mean the most convenient way that could possibly exist⁷.

1 *Clark v Cogge* (1607) Cro Jac 170; *Packer v Wellstead* (1658) 2 Sid 111; *Bolton v Bolton* (1879) 11 ChD 968.

2 *Bolton v Bolton* (1879) 11 ChD 968. See PARA 65 ante.

3 See *Clark v Cogge* (1607) Cro Jac 170.

4 *Packer v Wellstead* (1658) 2 Sid 111.

5 *Pearson v Spencer* (1861) 1 B & S 571 at 584; affd (1863) 3 B & S 761; *Horn v Taylor* (1607) Noy 128; *Deacon v South Eastern Rly Co* (1889) 61 LT 377; *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 3 All ER 437, [1998] 1 WLR 1749.

6 *Bolton v Bolton* (1879) 11 ChD 968.

7 *Pheysey v Vicary* (1847) 16 M & W 484 at 495-496 per Alderson B. Cf however *Brown v Alabaster* (1887) 37 ChD 490; *Pinnington v Galland* (1853) 9 Exch 1.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(iii) Rights of Way arising by Implication of Law/168. Duration of way of necessity.

168. Duration of way of necessity.

There can be no way of necessity unless the necessity existed at the time of the grant of the dominant tenement¹, and in as much as the exigency of the case alone calls it into existence, it continues only during the subsistence of the necessity; that is to say, the grant which arises by implication of law is a grant of a right of way until such time as the grantee may acquire the power from some other source of reaching the quasi-dominant tenement without using the quasi-servient tenement². If the grantee has once acquired such a power he cannot by his own act in extinguishing the power revive the way of necessity³.

1 *Midland Rly Co v Miles* (1886) 33 ChD 632.

2 *Holmes v Goring* (1824) 2 Bing 76; *Pearson v Spencer* (1863) 3 B & S 761 at 767, Ex Ch; *Pheysey v Vicary* (1847) 16 M & W 484; *Reignolds v Edwards* (1741) Willes 282. Cf however *Proctor v Hodgson* (1855) 10 Exch 824 at 828, where Parke B and Alderson B expressed the opinion that the decision in *Holmes v Goring* supra was probably wrong; and see *Deacon v South Eastern Rly Co* (1889) 61 LT 377 at 379.

3 Cf *Buckby v Coles* (1814) 5 Taunt 311.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(iv) Rights of Way claimed by Prescription./169. Claims by prescription.

(iv) Rights of Way claimed by Prescription.

169. Claims by prescription.

When a private right of way is claimed by prescription, there being no express words to construe, the only mode of measuring the nature and extent of the right is by having regard to the mode of enjoyment, and the way is therefore defined and limited by the evidence of user¹ and by the character of the dominant tenement².

If a way has been used for several purposes there may be a ground for inferring that there is a right of way for all purposes; but evidence of user for one purpose, or for particular purposes only, will not give rise to such an inference³.

1 *Howell v King* (1674) 1 Mod Rep 190; *Lawton v Ward* (1696) 1 Ld Raym 75; *Ballard v Dyson* (1808) 1 Taunt 279 at 283, 286-287; *Cowling v Higginson* (1838) 4 M & W 245 at 256-257; *Williams v James* (1867) LR 2 CP 577; *New Windsor Corp v Stovell* (1884) 27 ChD 665 at 672 per North J; *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362, CA; *Bradburn v Morris* (1876) 3 ChD 812, CA; *United Land Co v Great Eastern Ry Co* (1875) 10 Ch App 586 at 590 per Mellish LJ ('where a way is claimed by user the purpose for which the way may be used is limited by user; for we must judge from the way in which it has been used what the purposes were for which the party claiming has gained the right'); *Loder v Gaden* (1999) 78 P & CR 223, CA (a prescriptive right of way for access to agricultural land did not entitle the dominant owner to use it for the purpose of his haulage business). Cf *RPC Holdings Ltd v Rogers* [1953] 1 All ER 1029; *Sloan v Holliday* (1874) 30 LT 757; *Stott v Stott* (1812) 16 East 343.

2 *British Railways Board v Glass* [1965] Ch 538, [1964] 3 All ER 418, CA.

3 *Cowling v Higginson* (1838) 4 M & W 245 at 256; *Dare v Heathcote* (1856) 25 LJ Ex 245; *Lock v Abercester Ltd* [1939] Ch 861, [1939] 3 All ER 562; *Guise v Drew* (2001) 82 P & CR D47, [2001] All ER (D) 229 (Jun) (access to farm buildings; farm used primarily for residential purposes before 1980; use then becoming predominantly commercial; prescriptive right of way did not extend to commercial use which put extra burden on servient land). For cases relating to prescriptive claims to rights of way generally see *Lawton v Ward* (1696) 1 Ld Raym 75; *Ballard v Dyson* (1808) 1 Taunt 279; *Bright v Walker* (1834) 1 Cr M & R 211; *Codling v Johnson* (1829) 9 B & C 933; *Cowling v Higginson* supra; *Kinloch v Nevile* (1840) 6 M & W 795; *Lawson v Langley* (1836) 4 Ad & El 890; *Dare v Heathcote* supra; *R v Chorley* (1848) 12 QB 515; *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362, CA; *Bradburn v Morris* (1876) 3 ChD 812, CA; *Gayford v Moffatt* (1868) 4 Ch App 133; *Hollins v Verney* (1884) 13 QBD 304, CA; *Symons v Leaker* (1885) 15 QBD 629; *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, HL; *Kilgour v Gaddes* [1904] 1 KB 457, CA; *Damper v Bassett* [1901] 2 Ch 350. For cases relating to claims to rights of way under the doctrine of a lost modern grant see *Roberts and Lovell v James* (1903) 89 LT 282, CA; *Hulbert v Dale* [1909] 2 Ch 570, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(iv) Rights of Way claimed by Prescription./170. Claims under the Prescription Act 1832.

170. Claims under the Prescription Act 1832.

A right of way could not be acquired under the provisions of the Prescription Act 1832¹ over land which was held by a tenant under a lease for lives² because the user did not give a title against all persons having estates in the land, and it seems that the same applies in the case of a lease for years³.

1 See PARA 99 ante.

2 *Bright v Walker* (1834) 1 Cr M & R 211. Cf *Symons v Leaker* (1885) 15 QBD 629. As to the conversion of leases for life or lives into terms determinable on life see the Law of Property Act 1925 s 149(6); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240. As to prescription under the Prescription Act 1832 see PARAS 99-100 ante.

3 See PARA 97 note 2 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(v) Right to Deviate/171. Obstruction by servient owner.

(v) Right to Deviate

171. Obstruction by servient owner.

If the owner of the servient tenement places an obstruction across the way, the owner of the dominant tenement may, if the obstruction does not allow of easy removal, go round the obstruction so as to connect the two parts of the way on each side of the obstruction¹, and for this purpose may deviate over any part of the servient tenement provided he does so in a reasonable manner. The question whether or not the exercise of this right of deviation is reasonable is a question of fact, depending upon the circumstances of the particular case and having regard to the nature of the place and the extent of the right of way². The right to deviate is confined to the land of the servient owner³. The right of deviation over the servient tenement continues so long as the obstruction remains⁴. It is not incumbent upon the dominant owner to enter into litigation in respect of the obstruction so as to protect his original right of way, but long acquiescence in the continuance of the obstruction, and long user of the substituted way, may render it difficult for the dominant owner to insist upon the removal of the obstruction. The court will assist the dominant owner in the protection of the substituted way, even though he may still have a right to enforce the removal of the obstruction⁵. Ordinarily the erection of a gateway across the path or roadway is not an obstruction unless it amounts to a substantial obstruction⁶. The locking of the gate may readily cause an actionable obstruction even if the keys are available⁷.

1 *Selby v Nettlefold*(1873) 9 Ch App 111 at 114. As to deviation generally see HIGHWAYS, STREETS AND BRIDGES.

2 *Hawkins v Carbines* (1857) 27 LJ Ex 44.

3 If it were otherwise the deviation would be a trespass as against another landowner.

4 *Reignolds v Edwards* (1741) Willes 282; *Lovell v Smith* (1857) 3 CBNS 120; *Dawes v Hawkins* (1860) 8 CBNS 848; *Selby v Nettlefold*(1873) 9 Ch App 111.

5 *Selby v Nettlefold*(1873) 9 Ch App 111.

6 *Pettey v Parsons*[1914] 2 Ch 653, CA; *Geoghegan v Henry*[1922] 2 IR 1, CA.

7 See *Guest's Estates Ltd v Milner's Safes Ltd* (1911) 28 TLR 59 (gates locked and keys available). Cf para 177 the text and notes 15-16 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(v) Right to Deviate/172. Way becoming impassable.

172. Way becoming impassable.

If the way has become impassable from some cause other than the act of the servient owner the dominant owner is not entitled to deviate¹, even over land belonging to the grantor of the way².

1 *Bullard v Harrison* (1815) 4 M & S 387; *Taylor v Whitehead* (1781) 2 Doug KB 745; *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 322a, b, c, note (3), where it is pointed out that in 2 Bl Com (14th Edn) 35 and Com Dig, Chemin (D6) an opinion is expressed that the right to deviate because the way has become impassable from some cause other than the obstruction of the servient owner extends to private ways, but that the authorities cited in support of this opinion do not warrant it, as they seem only to relate to public ways.

2 *Taylor v Whitehead* (1781) 2 Doug KB 745; *Bullard v Harrison* (1815) 4 M & S 387. As to the right of persons using a public way to deviate where the road is impassable see HIGHWAYS, STREETS AND BRIDGES.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(vi) Persons Entitled to use Right of Way/173. Who may use right of way.

(vi) Persons Entitled to use Right of Way

173. Who may use right of way.

Apart from statute¹ the determination of the question who may use a right of way depends upon the nature and extent of the right². If the right is created by grant, the persons or classes of persons entitled to use it may be expressly limited by the terms of the instrument³, a grant of this kind being construed not strictly, but in accordance with the apparent intention of the parties⁴.

As a general rule the persons or classes of persons who may use the right must be ascertained by construing the instrument having regard to the general circumstances surrounding the execution of the grant⁵. The most important of these circumstances are the nature of the place over which the right is granted⁶, and the nature of the dominant tenement, and the purposes for which that tenement is, in the contemplation of the parties, intended to be used⁷. In the ordinary case of a grant of a right of way to a house which may only be used as a private dwelling house, the way may be used by, and the right extends to, the grantee and members of his family, visitors, guests, employees and tradespeople, even though none of these persons is expressly mentioned in the grant⁸. The owner of the dominant tenement may use a right of way to it, even though he is not in possession, for the purpose of viewing waste, demanding rent, removing an obstruction or other similar purposes⁹.

1 See PARA 47 ante.

2 *Cannon v Villars*(1878) 8 ChD 415 at 420-421.

3 See eg *Brunton v Hall*(1841) 1 QB 792.

4 *Mitcalfe v Westaway* (1864) 34 LJCP 113 at 116 per Byles J, where a reservation of a right of way in favour of 'assigns' was held to allow of other persons using the right who were not assigns in the strict legal interpretation of the word; but a reservation of a right to hunt, fowl, fish, hawk and set in favour of a grantor, his heirs and assigns, attendants, gamekeeper and servant does not include his licensees: *Reynolds v Moore*[1898] 2 IR 641.

5 See *Baxendale v North Lambeth Liberal and Radical Club Ltd*[1902] 2 Ch 427; *Milner's Safe Co Ltd v Great Northern and City Rly Co*[1907] 1 Ch 208 at 220; affd [1907] 1 Ch 229, CA.

6 *Cannon v Villars*(1878) 8 ChD 415; *Bulstrode v Lambert*[1953] 2 All ER 728, [1953] 1 WLR 1064.

7 See *Woodhouse & Co Ltd v Kirkland (Derby) Ltd* [1970] 1 WLR 1185 (right of way to business premises; held that identity of persons using it for those purposes was immaterial). See also *Thornton v Little* (1907) 97 LT 24, where a grant of a right of way to the owner of the dominant tenement for her and her 'tenants, visitors, and servants' was held a right of way for her pupils, the dominant tenement being a school at the time of the grant; and *Baxendale v North Lambeth Liberal and Radical Club Ltd*[1902] 2 Ch 427, where a grant of a right of way to premises used as a club was held to extend to members of the club. However, a grant of the use of a garden to lessees, sub-lessees, tenants, families and friends does not extend to members of a club, even if they are resident: *Keith v Twentieth Century Club Ltd* (1904) 73 LJ Ch 545; see also *Milner's Safe Co Ltd v Great Northern and City Rly Co*[1907] 1 Ch 208 at 227 (conversion of dwelling house into railway station and consequent user of way by passengers held never to have been contemplated; affd [1907] 1 Ch 229, CA); and *Hammond v Prentice Bros Ltd*[1920] 1 Ch 201.

8 *Baxendale v North Lambeth Liberal and Radical Club Ltd*[1902] 2 Ch 427 at 429 per Swinfen Eady J; *Hammond v Prentice Bros Ltd*[1920] 1 Ch 201 (grant of right of way not limited to class of persons named, but included their licensees).

9 *Proud v Hollis* (1822) 1 B & C 8.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(vii) Construction and Repair of Way/174. Construction of way.

(vii) Construction and Repair of Way

174. Construction of way.

In general the grantor of a right of way is under no liability to construct the way¹. The grantee of a right of way has a right to enter upon the grantor's land over which the way extends for the purpose of making the grant effective². Thus, if a right of way for carriages is granted over a field to the grantee's house, the grantee may enter the field and make over it a formed roadway suitable for supporting the ordinary traffic of a carriageway³, but the grantee may only construct such a way as is suitable to the right granted him⁴, and the necessary works must be executed in a reasonable manner and with ordinary skill and prudence⁵. The methods of construction which the grantee may employ are not confined to the methods existing at the time of the grant⁶.

1 *Newcomen v Coulson*(1877) 5 ChD 133 at 143, CA; *Osborn v Wise* (1837) 7 C & P 761; *Ingram v Morecraft* (1863) 33 Beav 49; *Duncan v Louch*(1845) 6 QB 904 at 909.

2 *Newcomen v Coulson*(1877) 5 ChD 133, CA; *Gerrard v Cooke* (1806) 2 Bos & PNR 109; *Senhouse v Christian* (1787) 1 Term Rep 560; *Abson v Fenton* (1823) 1 B & C 195; *Ingram v Morecraft* (1863) 33 Beav 49; *Tomlin v Fuller* (1669) 1 Mod Rep 27; *Stokes v Mixconcrete (Holdings) Ltd* (1978) 38 P & CR 488, CA.

3 *Newcomen v Coulson*(1877) 5 ChD 133, CA; see also *Gerrard v Cooke* (1806) 2 Bos & PNR 109, where it was held that a grant of a right of way to a house gave the grantee a right of laying down flagstones in front of the door of the house; *Senhouse v Christian* (1787) 1 Term Rep 560, where a grant of a convenient way for carrying coal was held to entitle the grantee to make a framed waggonway for the purpose of carrying the coal.

4 *Bidder v North Staffordshire Rly Co*(1878) 4 QBD 412, CA. See also *Nationwide Building Society v James Beauchamp*[2001] EWCA Civ 275, [2001] NPC 48, [2001] 45 EG 142.

5 *Abson v Fenton* (1823) 1 B & C 195.

6 *Senhouse v Christian* (1787) 1 Term Rep 560 at 567, 569; *Dand v Kingscote* (1840) 6 M & W 174.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(vii) Construction and Repair of Way/175. Liability and right to repair way.

175. Liability and right to repair way.

As a general rule the owner of the servient tenement is under no liability to repair the way over which a right of way has been granted¹, for such a liability is not a condition incident by law to the grant of a right of way; nor is it even a legal obligation incumbent on the grantee². The person entitled to the use of the way must do such repairs as he requires³, and has a right of entry upon the servient tenement for that purpose⁴. The right of repair is not limited to making good the defects in the original soil by subsidence or other natural causes, but includes the right of making the road reasonably fit for the purpose for which it was granted⁵. He is not, however, entitled to make improvements which would benefit his own land to the detriment of the owner of the land over which the right of way is exercised⁶. The servient owner is not prevented from doing acts on his land the result of which may be to render the repair of the way more expensive⁷.

1 *Taylor v Whitehead* (1781) 2 Doug KB 745 at 749; *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 322; *Ingram v Morecraft* (1863) 33 Beav 49; *Miller v Hancock* [1893] 2 QB 177 at 181, CA; *Jones v Pritchard* [1908] 1 Ch 630 at 638; *Stokes v Mixconcrete (Holdings) Ltd* (1978) 38 P & CR 488, CA; *Southwark London Borough Council v Mills* [2001] 1 AC 1 at 14, [1999] 4 All ER 449 at 458, HL, per Lord Hoffmann; and see PARA 24 ante. Cf *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39 (it is thought that the obligation of the lessor to take reasonable care to keep in repair the staircase which the tenant had the right to use was a duty owed to a tenant as tenant and not as dominant owner).

2 *Duncan v Louch* (1845) 6 QB 904 at 909-910 per Coleridge J.

3 *Taylor v Whitehead* (1781) 2 Doug KB 745 at 749 per Lord Mansfield; *Miller v Hancock* [1893] 2 QB 177 at 181, CA; *Ingram v Morecraft* (1863) 33 Beav 49; *Rider v Smith* (1790) 3 Term Rep 766; *Duncan v Louch* (1845) 6 QB 904 at 909.

4 *Liford's Case* (1614) 11 Co Rep 46b at 52a; *Hodgson v Field* (1806) 7 East 613; *Newcomen v Coulson* (1877) 5 ChD 133 at 143, CA; *Goodhart v Hyett* (1883) 25 ChD 182; *Duncan v Louch* (1845) 6 QB 904; and see PARAS 21-22 ante.

5 *Newcomen v Coulson* (1877) 5 ChD 133 at 143-144, CA. See also *Rudd v Rea* [1921] 1 IR 223; affd [1923] 1 IR 55, CA.

6 *Mills v Silver* [1991] Ch 271, [1991] 1 All ER 449, CA.

7 *Birkenhead Corp'n v London and North Western Rly Co* (1885) 15 QBD 572, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(vii) Construction and Repair of Way/176. Obligation to repair way.

176. Obligation to repair way.

The grantor and the grantee may respectively expressly bind themselves personally by agreement to repair the way¹. The question whether an obligation, as opposed to a right, to repair the site of an easement of way can be effectively imposed so as to run with the easement and the dominant tenement or with the servient tenement as the case may be, has never been conclusively decided. If the matter rests solely on a covenant, the benefit of it runs both at law and in equity with the covenantees' interest; but the burden is confined to the covenantor and his personal representatives and does not run at law or in equity so as to bind his successors in title², except in certain cases between lessor and lessee. The obligation may, however, perhaps be framed or construed so as to constitute a continuing condition and to render the easement itself conditional on the dominant owner for the time being complying with an obligation to repair, and so be determinable or defeasible on non-compliance. Where thus framed or construed the obligation would appear to be capable of being imposed as an incident of the easement itself, and not merely as a liability resting solely upon a covenant purporting to run with the land and the easement³. The principle *qui sentit commodum sentire debet et onus* may also apply to disable the dominant owner from exercising his right unless he complies with the obligation, but a successor who chooses not to take the benefit will escape the burden⁴.

The owner of the dominant tenement has been said, under the doctrine of prescription, to be able to claim to have the way repaired by the servient owner⁵. If this is right, there appears to be no reason why a similar obligation should not be cast upon the dominant owner. The fact that the doctrine of prescription is applicable at all to such a case shows that the right or obligation need not rest on a mere covenant purporting to run with the land, in as much as prescription always presumes an absolute grant, and notice is immaterial⁶. It is, however, doubtful whether these early cases would be applied today.

1 *Taylor v Whitehead* (1781) 2 Doug KB 745 at 749; and see PARA 25 ante.

2 *Austerberry v Oldham Corp*n (1885) 29 ChD 750; *Haywood v Brunswick Building Society* (1881) 8 QBD 403, CA; *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA; *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, HL; *Konstantinidis v Townsend* [2003] EWCA Civ 537, [2003] All ER (D) 314 (Mar); and see *E and GC Ltd v Bate* (1935) L Jo 203; *Saint v Jenner* [1973] Ch 275, [1973] 1 All ER 127, CA. It is not thought that *Gaw v C  ras Iompair   ireann* [1953] IR 232 can be regarded as authoritative, notwithstanding that it seems to have been approved in *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632 at 640, [1988] 2 All ER 885 at 889, HL, per Lord Oliver of Aylmerton.

3 *Duncan v Louch* (1845) 6 QB 904 at 913; *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, HL; and see *Allied London Industrial Properties Ltd v Castleguard Properties Ltd* (1997) 74 P & CR D43, CA. Cf *Re Ellenborough Park*, *Re Davies*, *Powell v Maddison* [1956] Ch 131, [1955] 3 All ER 667, CA.

4 *Halsall v Brizell* [1957] Ch 169, [1957] 1 All ER 371; *Rhone v Stephens* [1994] 2 AC 310, [1994] 2 All ER 65, HL; *Thamesmead Town Ltd v Allotey* (1998) 30 HLR 1052, [1998] 3 EGLR 97, CA. Cf *Re Ellenborough Park*, *Re Davies*, *Powell v Maddison* [1956] Ch 131 at 153, [1955] 2 All ER 38 at 51 per Danckwerts J; affd [1956] Ch 131, [1955] 3 All ER 667, CA. See also *Four Oaks Estate Ltd v Hadley* (1986) 83 LS Gaz 2326, CA.

5 *Rider v Smith* (1790) 3 Term Rep 766; *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 322a, b, c, note (3).

6 See PARA 76 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(vii) Disturbance of Right of Way/177. What amounts to disturbance of right of way.

(vii) Disturbance of Right of Way

177. What amounts to disturbance of right of way.

Any wrongful interference with a right of way constitutes a nuisance¹. As, however, a right of way never entitles the grantee, or those lawfully using the way under the grant, to the exclusive use of the land over which the way exists², not every obstruction of the way amounts to an unlawful interference³, and no claim will lie unless there is a substantial interference with the easement granted⁴. It will not be substantial if it does not interfere with the reasonable use of the right of way⁵; but even occasional obstruction may amount to substantial interference⁶. The effect of grant of a right of way differs in this respect from a grant of the soil of the way, for in the latter case the slightest interference is a trespass. The question whether any particular interruption amounts to an unlawful interference depends upon the nature of the right of way and of the place, and upon the general circumstances of the case⁷. Any disturbance of a way is unlawful which renders the way unfit for the purposes for which it was granted, to the injury of the person entitled to the way⁸. Thus, there would be an unlawful interference if the way is so damaged by vehicular or other traffic that the grantee is unable to use it⁹; or if the way is either wholly¹⁰ or partially obstructed by being built upon¹¹ or enclosed in a tunnel restricting the height of vehicles using the way¹²; or if the servient tenement is ploughed up so that the way cannot be used¹³.

In one case¹⁴ it was held that the locking of gates may readily cause an actionable obstruction even if the keys are available. However in a later case there was held to be no substantial interference where the tenants of flats were given keys to the outside door to the house in which the flats were situated, though the inability of the postman to obtain access to the house to deliver the tenants' mail did amount to substantial interference and the landlord had to take steps to deal with the matter¹⁵. More recently it has been said to be essentially a question of fact whether interference in any particular instance is a substantial interference¹⁶.

The nature of the remedy is the same whether the way was created by express grant or by way of reservation, or is claimed under the doctrine of prescription¹⁷.

1 *Saint v Jenner*[1973] Ch 275, [1973] 1 All ER 127, CA; *Lane v Capsey*[1891] 3 Ch 411; *Thorpe v Brumfitt*(1873) 8 Ch App 650.

2 *Sketchley v Berger* (1893) 69 LT 754 at 755; *Clifford v Hoare*(1874) LR 9 CP 362; *Strick & Co Ltd v City Offices Co Ltd* (1906) 22 TLR 667; *Hutton v Hamboro* (1860) 2 F & F 218.

3 *Thorpe v Brumfitt*(1873) 8 Ch App 650 at 656 per James LJ ('suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent'); *Hilton v James Smith & Sons (Norwood) Ltd* [1979] 2 EGLR 44, (1979) 257 Estates Gazette 1063, CA. As to interferences with easements generally see PARAS 144-145 ante.

4 *Sketchley v Berger* (1893) 69 LT 754 at 755 per Stirling J; *Overcom Properties v Stockleigh Hall Residents Management Ltd* (1988) 58 P & CR 1, [1989] 14 EG 78. See also *Clifford v Hoare*(1874) LR 9 CP 362; *Hutton v Hamboro* (1860) 2 F & F 218; and *Pullin v Deffel* (1891) 64 LT 134; and see PARA 145 ante. In *Robertson v Adams* (1930) 69 L Jo 301 the defendants, who were owners of an arcade over which the plaintiff had a right of way, placed stalls and tables along the width and in the centre of the arcade. This was held to be a substantial interference with the plaintiff's right and damages were awarded and an injunction was granted. A 'plaintiff' is now referred to as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

5 *Celsteel Ltd v Alton House Holdings Ltd* [1985] 2 All ER 562, [1985] 1 WLR 204 (revsd in part on another ground [1986] 1 All ER 608, [1986] 1 WLR 512, CA) (as to the facts of which see note 11 infra); *West v Sharp* (1999) 79 P & CR 327, CA; *Simpson v Fergus* (1999) 79 P & CR 398, CA; *B & Q plc v Liverpool and Lancashire Properties Ltd* (2000) 81 P & CR 246, [2001] 1 EGLR 92 (the test of an actionable interference is not whether what the grantee is left with is reasonable but whether his insistence on being able to continue with the use of the whole of what he contracted for is reasonable).

6 *CP Holdings v Dugdale* [1998] NPC 97.

7 *Shoesmith v Byerley* (1873) 28 LT 553 (carts standing for short periods upon a way where there was no room to pass them were held to be an obstruction which the dominant owner could have removed immediately); *Cannon v Villars* (1878) 8 ChD 415; *Sketchley v Berger* (1893) 69 LT 754 (a right of way granted over a strip of land broadening out at certain parts was held to give a right of way over the whole of the broad portions). See also *Harding v Wilson* (1823) 2 B & C 96; *Clifford v Hoare* (1874) LR 9 CP 362, where a protruding portico with columns the bases of which rested on the way was held to give no cause of action, although the right of way had been granted by specific measurement; *Keefe v Amor* [1965] 1 QB 334, [1964] 2 All ER 517, CA, citing *Dyer v Mousley* (30 July 1962, unreported), CA; and *Saint v Jenner* [1973] Ch 275, [1973] 1 All ER 127, CA (ramps laid down to check excessively fast use of right of way by dominant owner).

8 *Lawton v Ward* (1696) 1 Ld Raym 75; 2 Roll Abr 140; *Thorpe v Brumfitt* (1873) 8 Ch App 650; *Phillips v Treeby* (1862) 3 Giff 632; *Shoesmith v Byerley* (1873) 28 LT 553

9 *Lawton v Ward* (1696) 1 Ld Raym 75.

10 *Lane v Capsey* [1891] 3 Ch 411; *Phillips v Treeby* (1862) 3 Giff 632; affd (1862) 6 LT 796.

11 *Sketchley v Berger* (1893) 69 LT 754; *Celsteel Ltd v Alton House Holdings Ltd* [1985] 2 All ER 562, [1985] 1 WLR 204 (construction of car wash on driveway over which lessee had right of way reduced driveway from 9 to 4.14 metres and hindered access to his parking space; held to be substantial interference; revsd on another point [1986] 1 All ER 608, [1986] 1 WLR 512, CA). But the grantee could not object to a 2 ft projection into a 40 ft road which left ample space for the grantee to enjoy his right of way: *Clifford v Hoare* (1874) LR 9 CP 362. See also *Hayns v Secretary of State for the Environment* (1977) 36 P & CR 317, (1978) 245 Estates Gazette 53; *Young & Co's Brewery plc v Gordon* [2001] All ER (D) 56 (May) (construction of fire escape obstructed right of way).

12 *VT Engineering Ltd v Richard Barland & Co Ltd* (1968) 19 P & CR 890, 207 Estates Gazette 247.

13 2 Roll Abr 140.

14 See *Guest Estates Ltd v Milner's Safes Ltd* (1911) 28 TLR 59.

15 *Dawes v Adela Estates Ltd* (1970) 216 Estates Gazette 1405, where *Guest Estates Ltd v Milner's Safes Ltd* (1911) 28 TLR 59 was not cited.

16 See *Forestry Comrs for England and Wales v Omega Pacific Ltd* [2000] All ER (D) 17 (where it was held that the requirement that a prior appointment be made, the requirement that names be divulged and the maintenance of a locked gate without provision of a key did constitute substantial interference with the right of way; however, as a matter of discretion the remedy of an injunction was refused since, despite the imposition of those requirements, there was no evidence that the defendants had refused or would refuse entry to the claimants).

17 1 Roll Abr 109; Com Dig, Action upon the Case for Disturbance (A 2).

UPDATE

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NOTE 4--See also *The Sisters of the Sacred Heart of Mary Ltd v Kingston BC* [2008] All ER (D) 209 (Mar) (code-operated barrier controlling entry to private road constituted substantial interference with right of way).

NOTE 8--However, see *Ford-Camber Ltd v Deanminster Ltd* [2007] EWCA Civ 458, [2007] All ER (D) 419 (May) (land authority's exercise of statutory powers overrode claimant's right of way).

NOTE 11--See also *Hunte v E Bottomley and Sons Ltd* [2007] All ER (D) 220 (Oct), CA (erection of wall blocking access to commercial premises interfered with claimant's right of way).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(vii) Disturbance of Right of Way/178. Abatement.

178. Abatement.

The grantee of a right of way may abate the nuisance arising from the obstruction of the way, whether in whole or in part, by removing the obstruction or as much of it as will enable him to enjoy his right¹. It was formerly held that even if the obstruction consisted of an inhabited house, the owner of the dominant tenement might remove it, provided proper notice had been given and request had been made for its removal².

The remedy of abatement may be adopted even if the servient tenement is in the hands of a receiver appointed by the court³. The fact that the court has refused an application on the part of the dominant owner for a mandatory injunction for the removal of the obstruction does not necessarily prejudice his right of abatement⁴.

1 *Lane v Capsey* [1891] 3 Ch 411; see also *Baten's Case* (1610) 9 Co Rep 53b at 54b.

2 *Lane v Capsey* [1891] 3 Ch 411; see also *Davies v Williams* (1851) 16 QB 546; *Perry v Fitzhowe* (1846) 8 QB 757; *Jones v Jones* (1862) 1 H & C 1. This proposition must now be considered, however, in the light of (1) the Protection from Eviction Act 1977 (harassment; eviction without due process of law: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 608 et seq; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 214-215, 653); (2) and the modern dislike of self-help as a remedy; and (3) human rights legislation: see in particular the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8 (right to respect for private and family life, home and correspondence); and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

3 *Lane v Capsey* [1891] 3 Ch 411. The dominant owner in such a case, however, ought first to obtain the court's leave to proceed by the remedy of abatement. The court will grant leave unless it is perfectly clear that there is no foundation for the claim: *Randfield v Randfield* (1861) 3 De GF & J 766 at 771; *Angel v Smith* (1804) 9 Ves 335 at 340.

4 *Lane v Capsey* [1891] 3 Ch 411.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(1) RIGHTS OF WAY/(vii) Disturbance of Right of Way/179. Claim for an injunction or damages.

179. Claim for an injunction or damages.

The person entitled to a right of way may sue for an injunction to restrain obstruction of the way or for damages¹. If he in fact suffers no damage by the obstruction, nominal damages only will be awarded, and an injunction will be refused².

A person who in purported exercise of a right of way makes an excessive user of the servient tenement commits a trespass³ and may be restrained from so doing at the instance of the servient owner⁴. What amounts to excessive user depends on the scope of the right according to the true construction of an express grant or according to the user established by the prescription as the case may be⁵. A trespass committed in the manner described, however, gives no cause of action to persons who are not entitled to use the way and are not interested in the servient tenement⁶, nor can the dominant owner claim for physical damage to the way unless this substantially interferes with his right to use it⁷.

While an increase in user will not necessarily amount to an excessive user, it seems that the owner of a prescriptive right of way is not entitled to change the character of the land so as substantially to increase the burden on the servient tenement⁸.

A person interested only in reversion or remainder in the dominant tenement cannot sue for the protection of a right of way unless the obstruction is of such a nature that it either permanently injures the estate or operates as a denial of right⁹.

A person interested in reversion or remainder in the servient tenement cannot sue for trespass done under an alleged right of way, because the harm done to the tenement is not of a permanent nature, and because acts of this nature cannot operate as evidence of right against a person who has no present remedy by which he can obtain redress¹⁰.

Where the claimant wishes to do an act which will constitute an interference with the defendant's right of way the court may, in exceptional circumstances, grant a declaration that the defendants have no entitlement to an injunction in respect of any interference with the right of way, but their remedy, if any, is limited to an award of damages¹¹.

1 *Das v Linden Mews Ltd* [2002] EWCA Civ 590, [2003] 2 P & CR 58, sub nom *Chand v Linden Mews Ltd* [2002] All ER (D) 09 (May).

2 *Behrens v Richards* [1905] 2 Ch 614; and see PARAS 153-154 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 359. See also *Mayflower Estates Ltd v Highnorth Ltd* [2001] All ER (D) 13 (May) (immediate injunction inappropriate).

3 *Milner's Safe Co Ltd v Great Northern and City Rly Co* [1907] 1 Ch 208 at 228; affd [1907] 1 Ch 229, CA; *Hamble Parish Council v Haggard* [1992] 4 All ER 147, [1992] 1 WLR 122.

4 As to excessive user of a right of way see *Gayford v Moffatt* (1868) 4 Ch App 133 at 135; *Harris v Flower* (1904) 74 LJ Ch 127, CA; *Milner's Safe Co Ltd v Great Northern and City Rly Co* [1907] 1 Ch 208; *Williams v James* (1867) LR 2 CP 577; *Bradburn v Morris* (1876) 3 ChD 812, CA; *Finch v Great Western Rly Co* (1879) 5 ExD 254; *London Corpn v Riggs* (1880) 13 ChD 798. See also *White v Richards* [1993] RTR 318, 68 P & CR 105, CA; *Jobson v Record* (1997) 75 P & CR 375, [1998] 09 EG 148, CA (removal of timber felled elsewhere did not come within terms of grant).

5 *Kain v Norfolk* [1949] Ch 163, [1949] 1 All ER 176; *Todrick v Western National Omnibus Co* [1934] Ch 190 at 206 (revsd on another point [1934] Ch 561, CA); distinguished in *Robinson v Bailey* [1948] 2 All ER 791, CA; *Jelbert v Davis* [1968] 1 All ER 1182, [1968] 1 WLR 589, CA. See also *RPC Holdings Ltd v Rogers* [1953] 1 All ER 1029; *Devlin v Drewry* (1953) 162 Estates Gazette 64; *British Railways Board v Glass* [1965] Ch 538, [1964] 3

All ER 418, CA; *Woodhouse & Co Ltd v Kirkland (Derby) Ltd* [1970] 2 All ER 587, [1970] 1 WLR 1185; *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P & CR 978; *Fairview New Homes plc v Government Row Residents Association* [1998] EGCS 92; *Loder v Gaden* (1999) 78 P & CR 223, [1999] All ER (D) 396, CA; and PARA 56 ante.

6 *Milner's Safe Co Ltd v Great Northern and City Rly Co* [1907] 1 Ch 208 at 228.

7 *Weston v Lawrence Weaver Ltd* [1961] 1 QB 402, [1961] 1 All ER 478.

8 *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 ChD 362, CA (road immemorially used for agricultural purposes did not establish a right of way for carting materials to build new houses on land): *RPC Holdings Ltd v Rogers* [1953] 1 All ER 1029 (prescriptive way for agricultural purposes did not extend to passage of caravans, vehicles etc). Contrast *British Railways Board v Glass* [1965] Ch 538, [1964] 3 All ER 418, CA (prescriptive right to use crossing for purposes of a caravan site; increase in number of caravans from 6 to 29 did not amount to excessive user).

9 *Hopwood v Schofield* (1837) 2 Mood & R 34; *Kidgill v Moor* (1850) 9 CB 364; see also *Proud v Hollis* (1822) 1 B & C 8, where it was held that the landlord of the dominant tenement might use the way for the purposes of removing an obstruction; *Baxter v Taylor* (1832) 4 B & Ad 72; *Bell v Midland Rly Co* (1861) 10 CBNS 287; *Bower v Hill* (1835) 1 Bing NC 549 at 555; *Shadwell v Hutchinson* (1829) 3 C & P 615.

10 *Baxter v Taylor* (1832) 4 B & Ad 72; see also the Prescription Act 1832 ss 7, 8; (as amended) and PARAS 101-102 ante.

11 *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 3 All ER 437, [1998] 1 WLR 1749 (the question under consideration must be a real question; the person seeking the declaration must have a real interest; there must have been proper argument).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(i) Natural Right to Support/180. Nature of natural right to support.

(2) RIGHTS TO SUPPORT

(i) Natural Right to Support

180. Nature of natural right to support.

Apart from variations arising from easements, every owner of land has, as an incident of his ownership, the right to prevent such use of the neighbouring land as will withdraw the support which the neighbouring land naturally affords to his land¹. In the natural state of land one part of it receives support from another, upper from lower strata, and soil from adjacent soil, and therefore if one piece of land is conveyed so as to be divided in point of title from another contiguous to it, or, as in the case of mines, below it, the right to support passes with the land, not as an easement held by a distinct title, but as an essential incident to the land itself².

¹ *Humphries v Brogden*(1850) 12 QB 739 at 744; *Backhouse v Bonomi* (1861) 9 HL Cas 503; *Rowbotham v Wilson* (1857) 8 E & B 123, Ex Ch (affd (1860) 8 HL Cas 348); *Dalton v Angus*(1881) 6 App Cas 740 at 791, 808, HL; see also *North Eastern Rly Co v Elliott* (1860) 1 John & H 145 at 153 per Page Wood V-C (affd sub nom *Elliott v North Eastern Co* (1863) 10 HL Cas 333); *Birmingham Corp v Allen*(1877) 6 ChD 284, CA; *Greenwell v Low Beechburn Coal Co*[1897] 2 QB 165 at 170-171; *Jary v Barnsley Corp*[1907] 2 Ch 600; *Davies v Powell Duffryn Steam Coal Co Ltd (No 2)* (1921) 91 LJ Ch 40, CA; *Howley Park Coal and Cannel Co v London and North Western Rly Co*[1913] AC 11, HL.

² See *Dalton v Angus*(1881) 6 App Cas 740 at 791, HL, per Lord Selborne LC, and at 808 per Lord Blackburn; see also *Backhouse v Bonomi* (1861) 9 HL Cas 503 at 512-513 (where the weight of the buildings appears to have been treated as immaterial); *Proud v Bates* (1865) 6 New Rep 92; *Love v Bell*(1884) 9 App Cas 286, HL; *London and North Western Rly Co v Evans*[1893] 1 Ch 16 at 30, CA; *Jary v Barnsley Corp*[1907] 2 Ch 600; *Caledonian Rly Co v Sprot* (1856) 2 Macq 449, HL; *Davis v Treharne*(1881) 6 App Cas 460 at 466, HL.

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181. Extent of natural right to support.

The natural right to support does not entitle the owner of land to insist upon the adjoining land of his neighbour remaining in its natural state, but it is a right to have the benefit of support, which is infringed as soon as, and not until, damage is sustained in consequence of the withdrawal of that support¹. A claim in respect of the tort of interference with a natural right of support for land only arises when there has been actual damage to the neighbouring land².

Until recently the law was thought to be that while the dominant tenement had a right of support from the land of the servient tenement, the owner of the servient tenement was only liable if he did something to withdraw support. There was no positive duty to provide support³. Accordingly no claim would lie for erosion caused by supervening operation of the elements upon ordinary user of neighbouring land which did not of itself constitute a withdrawal of support resulting in damage⁴. In the absence of a covenant support was not 'withdrawn' by mere failure to keep a retaining wall in repair, but it was otherwise if any active step was taken to remove the support of the wall⁵. The same principles applied to lateral or adjacent support from adjoining land⁶, to the subjacent support of underlying strata where the surface of the land and the strata beneath it were different freeholds and belonged to different owners⁷, and to the right of the owner of a subterranean stratum to the support of the further strata beneath⁸.

These decisions require reconsideration in the light of a Court of Appeal decision⁹ which applied authorities¹⁰ holding the defendant liable in nuisance where water, fire or soil spread or escaped to the claimant's land, even though this was due to the act of a trespasser or natural causes. There was said to be no difference in principle between a danger caused by loss of support on the defendant's land and any other hazard or nuisance there which affects the claimant's use and enjoyment of land. It now appears that where the land of the dominant tenement is supported by land of the servient tenement the owner of the servient tenement has a positive duty to continue to provide support. However, liability only arises if there is negligence; the duty to abate the nuisance arises from the defendant's knowledge of the hazard that will affect his neighbour. In order to give rise to a measured duty of care, the defendant must know or be presumed to know of the defect or condition giving rise to the hazard and must, as a reasonable person, foresee that the defect or condition will, if not remedied, cause damage to the claimant's land. Depending on the facts the scope of the duty might be limited to warning the owner of the dominant tenement of such risk as the defendant was aware of, or ought to have foreseen, and sharing such information as the defendant had acquired relating to it¹¹.

1 *Dalton v Angus* (1881) 6 App Cas 740 at 808, HL.

2 *Midland Bank plc v Bardgrove Property Services Ltd* (1993) 37 ConLR 49, 65 P & CR 153, CA.

3 See *Sack v Jones* [1925] Ch 235; *Bond v Norman*, *Bond v Nottingham Corp'n* [1940] Ch 429, [1940] 2 All ER 12, CA; *Macpherson v London Passenger Transport Board* (1946) 175 LT 279. All these cases were considered in *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA.

4 *Rouse v Gravelworks Ltd* [1940] 1 KB 489, [1940] 1 All ER 26, CA (excavation of gravel near boundary; rain water collecting in gravel pit).

5 *Macpherson v London Passenger Transport Board* (1946) 175 LT 279; *Sack v Jones* [1925] Ch 235. See *Brace v South East Regional Housing Association Ltd* [1984] 1 EGLR 144, (1984) 270 Estates Gazette 1286, CA; and PARA 192 post.

6 *Hunt v Peake* (1860) John 705 at 710-711, where the additional weight of buildings on the land was found not to have in any way caused the subsidence; *Wyatt v Harrison* (1832) 3 B & Ad 871; *Elliot v North Eastern Rly Co* (1863) 10 HL Cas 333; *Birmingham Corp v Allen* (1877) 6 ChD 284, CA; *Jary v Barnsley Corp* [1907] 2 Ch 600; *Manchester Corp v New Moss Colliery Ltd* [1906] 1 Ch 278 at 291; revsd on appeal sub nom *New Moss Colliery Ltd v Manchester Corp* [1908] AC 117, HL, but without affecting this point. See also MINES, MINERALS AND QUARRIES.

7 *Humphries v Brogden* (1850) 12 QB 739 at 744-745; *Brown v Robins* (1859) 4 H & N 186; *Davis v Treharne* (1881) 6 App Cas 460 at 466, HL; *London and North Western Rly Co v Evans* [1893] 1 Ch 16 at 30, CA; *A-G v Conduit Colliery Co* [1895] 1 QB 301, DC; *Jary v Barnsley Corp* [1907] 2 Ch 600; and see *Manchester Corp v New Moss Colliery Ltd* [1906] 1 Ch 278 at 291 per Farwell J (revsd on appeal: see note 6 supra).

8 *Dixon v White* (1883) 8 App Cas 833 at 842, HL; see also *Butterley Co Ltd v New Hucknall Colliery Co Ltd* [1909] 1 Ch 37, CA; affd [1910] AC 381, HL; *Locker-Lampson v Staveley Coal and Iron Co* (1908) 25 TLR 136.

9 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA, applying *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 485, [1980] 1 All ER 17, CA and *Bar Gur v Bruton* [1993] CA Transcript 981. See also *Abbahall Ltd v Smea* [2002] EWCA Civ 1831, [2003] 1 All ER 465, [2003] 1 WLR 1472.

10 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, [1940] 3 All ER 349, HL; *Goldman v Hargrave* [1967] 1 AC 645, [1966] 2 All ER 989, PC; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 485, [1980] 1 All ER 17, CA.

11 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(i) Natural Right to Support/182. Subjacent support by minerals.

182. Subjacent support by minerals.

Prima facie the owner of the surface is entitled to support from the subjacent strata, and if the owner of the minerals¹ works them it is his duty to leave sufficient support for the surface in its natural state². The owner of the minerals may, however, substitute artificial support for the support afforded by the minerals³.

Where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining or other operations, unless such interference or disturbance is authorised by the instrument of severance either in express terms or by necessary implication⁴.

Thus, where minerals are severed from the surface by deed, instrument or Act of Parliament, the mineral owner is not entitled to let down the surface, unless by the deed, instrument or Act by which the minerals are severed it appears that the surface owner has parted with the right of support⁵. The mineral owner's right to get the minerals is limited to getting them in such a manner as not to occasion injury to the surface⁶.

1 In the case of coal any licensed operator is entitled, so far as may be reasonably required for the carrying on of any coal mining operation to which the licensing regulations apply, to withdraw support from certain land: see the Coal Industry Act 1994 s 38; and MINES, MINERALS AND QUARRIES. The rights of any person under s 38 are unregistered interests which override first registration and registered dispositions under the Land Registration Act 2002: see ss 11, 12, 29, 30, Sch 1 para 7, Sch 3 para 7; and LAND REGISTRATION. The statutory framework for compensation for subsidence damage caused by the withdrawal of support from land is contained in the Coal Mining Subsidence Act 1991: see MINES, MINERALS AND QUARRIES.

2 *Smart v Morton* (1855) 5 E & B 30 at 46; *Harris v Ryding* (1839) 5 M & W 60; *Humphries v Brogden* (1850) 12 QB 739 at 744; *Roberts v Haines* (1856) 6 E & B 643 (affd sub nom *Haines v Roberts* (1857) 7 E & B 625, Ex Ch); *Love v Bell* (1884) 9 App Cas 286, HL; *Proud v Bates* (1865) 6 New Rep 92; *Dixon v White* (1883) 8 App Cas 833, HL; *Davis v Treharne* (1881) 6 App Cas 460, HL; *New Sharlston Collieries Co v Earl of Westmorland* (1900) [1904] 2 Ch 443n, HL; *Butterknowle Colliery Co v Bishop Auckland Industrial Co-operative Co* [1906] AC 305 at 315, HL; *Beard v Moira Colliery Co Ltd* [1915] 1 Ch 257, CA (implied right to let down surface); *Manley v Burn* [1916] 2 KB 121, CA (liability of mineowner for subsidence of surface); *Lotus Ltd v British Soda Co Ltd* [1972] Ch 123, [1971] 1 All ER 265 (removal as liquid brine of dissolved rock salt); and see MINES, MINERALS AND QUARRIES. For the effect on the common law right of support of statutory 'mining codes' see MINES, MINERALS AND QUARRIES.

3 *Rowbotham v Wilson* (1857) 8 E & B 123 at 157, Ex Ch; affd (1860) 8 HL Cas 348.

4 *Butterknowle Colliery Co v Bishop Auckland Industrial Co-operative Co* [1906] AC 305 at 313, HL, per Lord Macnaghten.

5 *London and North Western Rly Co v Evans* [1893] 1 Ch 16, CA; *Caledonian Rly Co v Sprot* (1856) 2 Macq 449, HL; *Love v Bell* (1884) 9 App Cas 286, HL; *Davis v Treharne* (1881) 6 App Cas 460 at 466, HL; *Jones v Consolidated Anthracite Collieries Ltd and Lord Dynevor* [1916] 1 KB 123; *Davies v Powell Duffryn Steam Coal Co Ltd (No 2)* (1921) 91 LJ Ch 40, CA. See also MINES, MINERALS AND QUARRIES.

6 *London and North Western Rly Co v Evans* [1893] 1 Ch 16 at 30, CA; cf *Butterknowle Colliery Co v Bishop Auckland Industrial Co-operative Co* [1906] AC 305, HL. See generally MINES, MINERALS AND QUARRIES.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(i) Natural Right to Support/183. Subjacent support by water.

183. Subjacent support by water.

The owner of land has no natural right to the support afforded by water in or under his neighbour's land¹. A person can drain off water from his own land notwithstanding that his so doing deprives his neighbour's land of the support which it derived from the presence of the water². If, however, the support is derived from some substance which, though partially composed of water, possesses physical attributes altogether different from water, the owner of land has a natural right to insist upon its continuance³.

1 *Popplewell v Hodkinson* (1869) LR 4 Exch 248; *Elliot v North Eastern Rly Co* (1863) 10 HL Cas 333 at 359; see also *Jordeson v Sutton, Southcoates and Drypool Gas Co* [1899] 2 Ch 217 at 245-246, CA, per Vaughan Williams LJ.

2 *Langbrook Properties Ltd v Surrey County Council* [1969] 3 All ER 1424, [1970] 1 WLR 161; *Popplewell v Hodkinson* (1869) LR 4 Exch 248; *Stephens v Anglian Water Authority* [1987] 3 All ER 379, [1987] 1 WLR 1381, CA. But cf *Littledale v Earl of Lonsdale* (1791) reported in [1899] 2 Ch 233n; and see *Gill v Westlake* [1910] AC 197, PC.

3 *Jordeson v Sutton, Southcoates and Drypool Gas Co* [1899] 2 Ch 217, CA (running silt); *Trinidad Asphalt Co v Ambard* [1899] AC 594, PC (semi-fluid pitch); *Gill v Westlake* [1910] AC 197, PC; *Lotus Ltd v British Soda Co Ltd* [1972] Ch 123, [1971] 1 All ER 265 (removal as liquid brine of dissolved rock salt).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(i) Natural Right to Support/184. Support for buildings by land.

184. Support for buildings by land.

The owner of land has no natural right to support for buildings or for the additional weight which the buildings cause¹. Support to that which is artificially imposed upon land cannot exist in the natural course of things (*ex jure naturae*), because the thing supported does not itself so exist².

The mere fact, however, that there are buildings upon his land does not preclude an owner from his right against a neighbour or subjacent owner who acts in such a manner as to deprive the land of support, so long as the presence of the buildings does not materially affect the question, or their additional weight did not cause the subsidence which followed the withdrawal of support³.

1 *North Eastern Rly Co v Elliott* (1860) 1 John & H 145 at 153 (affd sub nom *Elliot v North Eastern Rly Co* (1863) 10 HL Cas 333); *Smith v Thackerah* (1866) LR 1 CP 564; see also *Brown v Robins* (1859) 4 H & N 186; *Hamer v Knowles* (1861) 6 H & N 454; *A-G v Conduit Colliery Co* [1895] 1 QB 301 at 312, DC; *Wilde v Minsterley* (1639) 2 Roll Abr 564 at 565.

2 *Dalton v Angus* (1881) 6 App Cas 740 at 792, HL.

3 *Brown v Robins* (1859) 4 H & N 186 at 193-194.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(i) Natural Right to Support/185. Support for buildings by buildings.

185. Support for buildings by buildings.

The owner of land upon which there are buildings has no natural right, in respect of those buildings, to support afforded them by buildings upon his neighbour's land¹. At common law, if a person pulls down his house and thereby deprives his neighbour's house of the support it has been enjoying, and his neighbour's house is thereby damaged, his neighbour, in the absence of an easement of support, has no cause of action. He must take care to interfere as little as possible with the adjoining house, but he is not called upon to take active steps for its protection, as, for instance, by shoring it up². Where an owner pulls down his buildings and thereby withdraws natural support from his neighbour's house and damage is caused because the weak and fragile condition of his neighbour's house required the exercise of extra care, he is not liable for damage resulting from that condition where he has no notice of it³.

The common law relating to party walls and rights of support has, however, now been largely replaced by the Party Wall etc Act 1996⁴.

1 *Peyton v London Corpn* (1829) 9 B & C 725; *Wyatt v Harrison* (1832) 3 B & Ad 871; *Chadwick v Trower* (1839) 6 Bing NC 1, Ex Ch; see also *Southwark and Vauxhall Water Co v Wandsworth Board of Works* [1898] 2 Ch 603 at 612, CA, per Collins LJ. Cf *Dodd v Holme* (1834) 1 Ad & El 493.

2 *Southwark and Vauxhall Water Co v Wandsworth Board of Works* [1898] 2 Ch 603, CA.

3 *Chadwick v Trower* (1839) 6 Bing NC 1 at 10, Ex Ch, per Parke B.

4 The Party Wall etc Act 1996 is fully considered in BOUNDARIES vol 4(1) (2002 Reissue) PARA 961 et seq. Consideration should be given to the possible implications of the decision in *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA where there was a natural right of support: see PARA 181 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(ii) Easement of Support/186. Nature of easement of support.

(ii) Easement of Support

186. Nature of easement of support.

The easement of support is a right acquired over and above the natural rights of support. It may either involve an enhancement to the dominant owner's natural right of support with a corresponding increase of the servient owner's obligations to refrain from interference¹, or it may involve a diminution of the dominant owner's obligations to refrain from depriving the servient tenement of the support to which the servient owner would otherwise have been entitled². The protection afforded extends not only to the effect of the weight of the structure to be supported but also to the effect on it of wind suction³.

The easement of support may be defined as the right of an owner of buildings not to have the support which the dominant tenement receives from the land or buildings of his neighbour removed without replacement. The traditional view is that the servient owner may, by doing nothing, allow his building to decay and so remove all support without thereby giving the dominant owner any cause of action; but he must not do acts which remove the support without providing a substitute⁴. It remains to be seen whether the extension of the claim of nuisance in the case of a natural right of support will be extended to the case of an easement of support⁵.

The acquired right may be a right to have buildings supported by land, or a right to have buildings supported by other buildings⁶, for the easement of support is as applicable to the support from an adjoining building as it is to the support from adjoining or subjacent land⁷. When once acquired the easement of support is similar in character to the natural right of support⁸.

If an easement has been acquired by prescription so that a claimant is entitled to enjoy support for his land and building from his neighbour's adjoining land or building, that right is for support for the land and building as they have been used during the period of prescription. Only if it can be shown that the nature of the use has materially altered can it be said that the easement does not benefit the claimant⁹.

The common law relating to party walls and rights of support has, however, now been largely replaced by the Party Wall etc Act 1996¹⁰.

¹ See as in the case of the ordinary easement of support for buildings: see *Dalton v Angus*(1881) 6 App Cas 740, HL.

² See as in the case of an easement entitling the owner to let down the surface: see *Love v Bell*(1884) 9 App Cas 286, HL; *Butterknowle Colliery Co v Bishop Auckland Industrial Co-operative Co*[1906] AC 305 at 310, HL; *Consett Waterworks Co v Ritson*(1889) 22 QBD 318; *reversed on appeal* (1889) 22 QBD 702, CA.

³ *Rees v Skerrett* [2001] EWCA Civ 760, [2001] 1 WLR 1541, [2001] 40 EG 163, CA (the owner of a terraced house who demolished his property was under a duty to take reasonable steps to provide weatherproofing for the dividing wall once it was exposed to the elements as a result of the demolition). See the Party Wall etc Act 1996 s 2(2)(n).

⁴ *Byard v Co-operative Building Society Ltd* (1970) 21 P & CR 807 at 820-821; *Bond v Nottingham Corp*[1940] Ch 429, [1940] 2 All ER 12, CA. See *Bradburn v Lindsay*[1983] 2 All ER 408, 268 Estates Gazette 152 (neglect of house leading to demolition with consequent loss of support for neighbouring house).

5 See *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA; and PARA 181 ante.

6 *Lemaitre v Davis*(1881) 19 ChD 281 at 290; *Brown v Windsor* (1830) 1 Cr & J 20; *Richards v Rose*(1853) 9 Exch 218; *Waddington v Naylor* (1889) 60 LT 480; *Greenwell v Low Beechburn Coal Co*[1897] 2 QB 165; *Jones v Pritchard*[1908] 1 Ch 630 at 635-636 per Parker J. Cf also *Chadwick v Trower* (1839) 6 Bing NC 1; *Langford v Woods* (1844) 7 Man & G 625.

7 *Lemaitre v Davis*(1881) 19 ChD 281; *Selby v Whitbread & Co*[1917] 1 KB 736 at 751 per McCardie J.

8 *Dalton v Angus*(1881) 6 App Cas 740 at 809, HL, per Lord Blackburn; *Bonomi v Backhouse* (1859) EB & E 646 at 654, Ex Ch, per Willes J (on appeal sub nom *Backhouse v Bonomi* (1861) 9 HL Cas 503); *Greenwell v Low Beechburn Coal Co*[1897] 2 QB 165 at 171.

9 *Woodhouse v Consolidated Property Corp'n Ltd* (1992) 66 P & CR 234, [1993] 1 EGLR 174, CA.

10 See PARA 185 note 4 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(ii) Easement of Support/187. Acquisition of easement of support.

187. Acquisition of easement of support.

A right of support for buildings must in each particular case be acquired by grant, or by some other means equivalent in law to grant, in order to make it a burden upon the land which in its natural state would be free from it¹. The easement may be created by express grant², or may arise by implication of law³ or may be established under the doctrine of prescription⁴ or under the Prescription Act 1832⁵.

It may also be created either expressly or impliedly by Act of Parliament⁶. Where a statute empowers undertakers to construct and maintain works for the benefit of the public upon the land of private owners, and those works necessarily require support from subjacent soil, and provision is made in the statute for compensating the private owners for the damage to the surface and subjacent minerals to be caused by the contemplated works, a right of support from subjacent soil for the authorised works necessarily arises by implication, unless the statute negatives it⁷. Where, however, no right of compensation is given by the statute the case may be different⁸.

1 *Dalton v Angus* (1881) 6 App Cas 740 at 792, HL, per Lord Selborne LC.

2 *Dalton v Angus* (1881) 6 App Cas 740 at 809, HL, per Lord Blackburn.

3 *Dalton v Angus* (1881) 6 App Cas 740, HL; *Rigby v Bennett* (1882) 21 ChD 559, CA; *Richards v Rose* (1853) 9 Exch 218; cf *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557, CA.

4 *Dalton v Angus* (1881) 6 App Cas 740, HL; *Lemaitre v Davis* (1881) 19 ChD 281; *Latimer v Official Co-operative Society* (1855) 16 LR Ir 305; *Greenwell v Low Beechburn Coal Co* [1897] 2 QB 165; *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557, CA, where, however, the prescriptive claim failed as the enjoyment had not been open; *Jordeson v Sutton, Southcoates and Drypool Gas Co* [1898] 2 Ch 614 at 625; affd [1899] 2 Ch 217, CA.

5 See *Selby v Whitbread & Co* [1917] 1 KB 736 at 751 per McCardie J.

6 *London and North Western Rly Co v Evans* [1893] 1 Ch 16 at 31, CA; *Re Dudley Corpn* (1881) 8 QBD 86, CA; *Benfieldside Local Board v Consett Iron Co* (1877) 3 ExD 54; *Jary v Barnsley Corpn* [1907] 2 Ch 600. Cf *Great Northern Rly Co v IRC* [1901] 1 KB 416 at 428-429, CA; and see also the Leasehold Reform Act 1967 s 10(2); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1453.

7 *London and North Western Rly Co v Evans* [1893] 1 Ch 16 at 31, CA, per AL Smith LJ; and cf *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1904] AC 64, HL (a Scottish case).

8 *London and North Western Rly Co v Evans* [1893] 1 Ch 16 at 28-29, CA; *Metropolitan Board of Works v Metropolitan Rly Co* (1869) LR 4 CP 192, Ex Ch, where there was no right to compensation given to the person against whom the support was claimed. See also *Roderick v Aston Local Board* (1877) 5 ChD 328 at 332, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(ii) Easement of Support/188. Implied grant of easement of support.

188. Implied grant of easement of support.

The general rules¹ governing the creation of easements by implication of law upon a disposition of the dominant and servient tenements, or of either of them, also govern the creation of the easement of support on such an occasion². The easement of support is not in general an easement of necessity, so as necessarily to arise in favour of the common owner of the dominant and servient tenements if he disposes of the servient, and retains the dominant, tenement³. Under special circumstances, however, it may be an easement of necessity⁴.

If the common owner of two pieces of land conveys one of them he can do nothing which will derogate from his grant; and if he has conveyed it with the express intention of having buildings erected upon it, neither he nor his successors in title can do any act upon the retained piece of land which deprives of support the buildings erected upon the other piece⁵.

1 For these rules see PARA 63 ante.

2 See *Wheeldon v Burrows* (1879) 12 ChD 31, CA.

3 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557, CA.

4 Eg where the common owner retains a house which derives obvious and necessary support from the neighbouring house of which he has disposed: see *Richards v Rose* (1853) 9 Exch 218; *Howarth v Armstrong* (1897) 77 LT 62, CA; *Shubrook v Tufnell* (1882) 46 LT 886.

5 *North Eastern Rly Co v Elliott* (1860) 1 John & H 145 (affd sub nom *Elliott v North Rly Co* (1863) 10 HL Cas 333); *Caledonian Rly Co v Sprot* (1856) 2 Macq 449, HL; *North Eastern Rly Co v Crossland* (1862) 2 John & H 565 (on appeal (1862) 4 De GF & J 550); see also *Siddons v Short* (1877) 2 CPD 572; *Rigby v Bennett* (1882) 21 ChD 559, CA; *Murchie v Black* (1865) 19 CBNS 190.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(ii) Easement of Support/189. Prescriptive right to support.

189. Prescriptive right to support.

Where an easement of support is claimed by prescription there is no enjoyment as of right, which is essential to the success of such a claim, unless the owner of the servient tenement has had a reasonable opportunity of becoming aware of the enjoyment of support from his property¹. The enjoyment of the support must be open, that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of it².

1 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 571, CA; *Lemaitre v Davis* (1881) 19 ChD 281; *Dalton v Angus* (1881) 6 App Cas 740, HL; *Solomon v Vintner's Co* (1859) 4 H & N 585; *Gately v Martin* [1900] 2 IR 269. For the meaning of 'enjoyment as of right' see PARA 85 ante.

2 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557 at 571, CA, per Romer LJ; *Lloyds Bank Ltd v Dalton* [1942] Ch 466, [1942] 2 All ER 352.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(ii) Easement of Support/190. Easement of support under the Prescription Act 1832.

190. Easement of support under the Prescription Act 1832.

The easement of support for buildings from land¹ or from other buildings² is an easement within the meaning of the Prescription Act 1832³ and may be claimed under the provisions of that statute⁴. It may also probably be claimed under the doctrine of a lost modern grant or by prescription at common law⁵.

1 *Dalton v Angus* (1881) 6 App Cas 740 at 798, HL.

2 *Lemaitre v Davis* (1881) 19 ChD 281.

3 See PARA 99 et seq ante.

4 *Dalton v Angus* (1881) 6 App Cas 740, HL; *Selby v Whitbread & Co* [1917] 1 KB 736. As to prescription under the Prescription Act 1832 see PARA 100 ante.

5 *Dalton v Angus* (1881) 6 App Cas 740 at 811, HL; *Tehidy Minerals v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA; *Hunter v Canary Wharf Ltd* [1997] AC 655 at 709, [1997] 2 All ER 426 at 454, HL, per Lord Hoffmann, although arguably his dictum may be restricted to prescription under the Prescription Act 1832.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(ii) Easement of Support/191. Party structures.

191. Party structures.

Where under a disposition or other arrangement which, if a holding in undivided shares had been permissible, would have created a tenancy in common, a wall or other structure is or is expressed to be made a party wall¹ or structure, that structure must be and remain severed vertically as between the respective owners, and the owner of each part is to have such rights to support² and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created³. Any person interested may in case of dispute apply to the court for an order declaring the rights and interests under the foregoing provisions of the person interested in any such party structure, and the court may make such order as it thinks fit⁴.

The common law relating to party walls⁵ and rights of support has been largely replaced by the provisions of the Party Wall etc Act 1996. The common law rules now only apply in those situations not covered by the Act or where the procedures of the Act have not been followed⁶.

1 For the meaning of 'party wall' at common law see BOUNDARIES vol 4(1) (2002 Reissue) PARA 963.

2 For consideration of the rights to support in accordance with these provisions see *Upjohn v Seymour Estates Ltd* [1938] 1 All ER 614; and BOUNDARIES vol 4(1) (2002 Reissue) PARA 972 et seq; see also *Lathey and Lathey v LCC* (1953) 103 L Jo 416 (damages awarded on withdrawal of support); *Bradburn v Lindsay* [1983] 2 All ER 408, 268 Estates Gazette 152 (neglect of house leading to demolition with consequent loss of support for neighbouring house).

3 Law of Property Act 1925 s 38(1). For transitional provisions dealing with party structures held in undivided shares immediately prior to the enactment of s 38 see s 39, Sch 1 Pt V para 3; and REAL PROPERTY vol 39(2) (Reissue) PARA 63. As to the procedure and jurisdiction see ss 203, 204 (as amended).

4 Ibid s 38(2).

5 For the purposes of the Party Wall etc Act 1996 'party wall' is defined in s 20.

6 See PARA 185 note 4 ante; and BOUNDARIES vol 4(1) (2002 Reissue) PARAS 961, 965-967, 979 et seq. See also *Louis v Sadiq* (1996) 74 P & CR 325, [1997] 1 EGLR 136, CA (decided under the London Buildings Acts (Amendment) Act 1939). Nothing in the Party Wall etc Act 1996, however, authorises any interference with an easement of light or other easements in or relating to a party wall or prejudicially affects any right of any person to preserve or restore any right or other thing in or connected with a party wall in case of the party wall being pulled down or rebuilt: s 9.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(iii) Interference with Support/192. Disturbance of easement of support.

(iii) Interference with Support

192. Disturbance of easement of support.

An interference with an easement of support to buildings occurs when the support has been actually removed and a change in the state of the dominant tenement has been effected by it¹. There is no interference where one mode of support is substituted for another, provided the actual support continues². Any interference gives rise to a cause of action, even if the dominant owner has not suffered pecuniary loss³, for as soon as the condition of the dominant tenement has been in fact changed to a substantial extent by the withdrawal of the support, the dominant owner has sustained an injury for which he may maintain a claim without proof of such loss⁴. Where the change is very slight, the rule that the law is not concerned with trifles (*de minimis non curat lex*) applies⁵.

Where a claimant has a prescriptive right of support from an adjoining building, the owner of that adjoining building will be liable for interference with the right of support if he demolishes his building and, as a consequence, the clay upon which it was built dries out and shrinks resulting in subsidence which causes damage to the claimant's building⁶.

1 *Hall v Duke of Norfolk*[1900] 2 Ch 493 at 501. Cf *Sack v Jones*[1925] Ch 235; *MacPherson v London Passenger Transport Board* (1946) 175 LT 279.

2 *Bower v Peate*(1876) 1 QBD 321 at 327; *Rowbotham v Wilson* (1857) 8 E & B 123 at 157, Ex Ch; affd (1860) 8 HL Cas 348; *Bond v Nottingham Corpn*[1939] Ch 847, [1939] 3 All ER 669; affd [1940] Ch 429, [1940] 2 All ER 12, CA.

3 *A-G v Conduit Colliery Co*[1895] 1 QB 301 at 311, DC; cf *Backhouse v Bonomi* (1861) 9 HL Cas 503 at 512.

4 *A-G v Conduit Colliery Co*[1895] 1 QB 301 at 311, DC (natural right of support); *Selby v Whitbread & Co*[1917] 1 KB 736. The principle, however, is the same as regards the easement: see *Mitchell v Darley Main Colliery Co*(1884) 14 QBD 125 at 137, CA; affd sub nom *Darley Main Colliery Co v Mitchell*(1886) 11 App Cas 127, HL; see contra, *Smith v Thackerah*(1866) LR 1 CP 564; explained in *A-G v Conduit Colliery Co* supra at 313, DC, per Collins J. See also *Midland Bank plc v Bardgrove Property Services Ltd* (1992) 65 P & CR 153, [1992] 2 EGLR 168, CA (no cause of action for loss incurred in effecting remedial works to prevent anticipated physical damage).

5 *A-G v Conduit Colliery Co*[1895] 1 QB 301 at 311, DC; *Backhouse v Bonomi* (1861) 9 HL Cas 503 at 512.

6 *Brace v South East Regional Housing Association Ltd*[1984] 1 EGLR 144, (1984) 270 Estates Gazette 1286, CA, distinguishing cases such as *Chasemore v Richards* (1859) 7 HL Cas 349 and *Jordeson v Sutton, Southcoates and Drypool Gas Co*[1899] 2 Ch 217, CA, which allow immunity to a defendant who draws off percolating water to which a claimant has no proprietary right. A licence to draw off water is now commonly required: see the Water Resources Act 1991 s 24 (as amended); and WATER AND WATERWAYS vol 100 (2009) PARA 214. See also PARA 183 ante.

UPDATE

192 Disturbance of easement of support

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements

mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(iii) Interference with Support/193. When cause of action arises.

193. When cause of action arises.

It is not the removal of the support but the causing of a change in the state of the dominant tenement which gives rise to the cause of action¹. Consequently under the Limitation Act 1980², like its predecessors, time does not begin to run against a dominant owner until the change has actually occurred³. Each successive change or subsidence gives rise to a fresh cause of action⁴. In estimating the damages the depreciation in market value of the property due to the risk of future subsidence cannot be taken into account⁵. Where, however, further damage is threatened it may be possible to obtain a quia timet injunction or damages in lieu⁶.

A lessee⁷, and probably an owner in fee⁸, of minerals or underground strata is not liable to the owner of the surface who enjoys an easement of support in respect of his building for damage caused to that building during the lessee's or owner's possession where the damage is the result of the removal of support by his predecessor⁹.

1 *Lamb v Walker* (1878) 3 QBD 389 at 402; *Backhouse v Bonomi* (1861) 9 HL Cas 503; *Greenwell v Low Beechburn Coal Co* [1897] 2 QB 165 at 171-172; *Crumbie v Wallsend Local Board* [1891] 1 QB 503, CA; *West Leigh Colliery Co Ltd v Tunncliffe and Hampson Ltd* [1908] AC 27, HL; cf *Whitehouse v Fellowes* (1861) 10 CBNS 765.

2 See the Limitation Act 1980 s 2; and LIMITATION PERIODS.

3 *Backhouse v Bonomi* (1861) 9 HL Cas 503; *Spoor v Green* (1874) LR 9 Exch 99; *Hall v Duke of Norfolk* [1900] 2 Ch 493 at 501; *Greenwell v Low Beechburn Coal Co* [1897] 2 QB 165 at 170, 171. See also *Midland Bank plc v Bardgrove Property Services Ltd* (1992) 65 P & CR 153, [1992] 2 EGLR 168, CA (no cause of action for loss incurred in effecting remedial works to prevent anticipated physical damage).

4 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, HL; *Hall v Duke of Norfolk* [1900] 2 Ch 493 at 501; *Crumbie v Wallsend Local Board* [1891] 1 QB 503, CA. See also *Manley v Burn* [1916] 2 KB 121.

5 *West Leigh Colliery Co Ltd v Tunncliffe and Hampson Ltd* [1908] AC 27, HL; and see DAMAGES vol 12(1) (Reissue) PARA 834.

6 *Hooper v Rogers* [1975] Ch 43, CA, not cited in *Midland Bank plc v Bardgrove Property Services Ltd* (1992) 65 P & CR 153, [1992] 2 EGLR 168, CA.

7 *Greenwell v Low Beechburn Coal Co* [1897] 2 QB 165 at 174; *Hall v Duke of Norfolk* [1900] 2 Ch 493.

8 Cf *Greenwell v Low Beechburn Coal Co* [1897] 2 QB 165 at 174 per Bruce J.

9 See *Manley v Burn* [1916] 2 KB 121, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(iv) Repair and Analogous Rights/194. Repair.

(iv) Repair and Analogous Rights

194. Repair.

As a general rule, in the absence of express agreement to the contrary, the owner of the servient tenement burdened with an easement of support is under no obligation to repair in order to maintain the easement¹. It remains to be seen whether the extension of liability in nuisance in some circumstances where there is a natural duty of support will be applied in the case of an easement of support so as to impose a positive duty to continue support, with a consequent obligation to repair². The dominant owner may, however, enter the servient tenement for the purpose of doing such repairs as are necessary for the maintenance of the support³.

1 *Colebeck v Girdlers Co*(1876) 1 QBD 234, DC. See also *Sack v Jones*[1925] Ch 235.

2 See *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, [2000] 2 All ER 705, CA; and PARA 181 ante.

3 *Colebeck v Girdlers Co*(1876) 1 QBD 234, DC; *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321; *Stockport and Hyde Division of Macclesfield Hundred Highway Board v Grant* (1882) 51 LJB 357. As to repair in the case of easements generally see PARAS 21-22 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(iv) Repair and Analogous Rights/195. Right to let down the surface.

195. Right to let down the surface.

There are certain other rights relating to the support of land, analogous to easements, known as 'rights of letting down the surface'. They are rights contrary to the natural rights of support which have already been mentioned, and they consist generally of acquired rights to deprive land of the support which in the natural course of things (*ex jure naturae*) the owner of that land would be otherwise entitled to enjoy¹.

These rights generally exist either directly or indirectly by virtue of some Act of Parliament². They may, however, form the subject matter of a grant³, and there seems, therefore, no reason why they should not be acquired by prescription.

¹ See eg *Love v Bell* (1884) 9 App Cas 286, HL; *Butterknowle Colliery Co v Bishop Auckland Industrial Co-operative Co* [1906] AC 305 at 310-311, HL; *Consett Waterworks Co v Ritson* (1889) 22 QBD 318; revsd (1889) 22 QBD 702, CA; and see MINES, MINERALS AND QUARRIES.

² Eg the Mines (Working Facilities and Support) Act 1966 ss 1, 2(1) (as amended) which provide that rights which may be granted for facilitating the working of minerals include the right to let down the surface: see MINES, MINERALS AND QUARRIES. For examples of particular cases where power to let down the surface has been inferred or has been negatived see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 131.

³ *Rowbotham v Wilson* (1860) 8 HL Cas 348 at 368 per Lord Chelmsford; *Williams v Bagnall* (1866) 15 WR 272; *Sitwell v Earl of Londesborough* [1905] 1 Ch 460.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(2) RIGHTS TO SUPPORT/(iv) Repair and Analogous Rights/196. Statutory obligation.

196. Statutory obligation.

A binding obligation imposed by Act of Parliament upon a mineral owner not to work his minerals which imposes only a negative duty upon him to abstain from certain acts is not an easement even of a negative kind¹. Such a duty can only be created by statute or by covenant, but if created by covenant it does not necessarily bind all subsequent owners of the minerals².

1 *Great Northern Ry Co v IRC* [1901] 1 KB 416 at 428-429, CA.

2 *Great Northern Ry Co v IRC* [1901] 1 KB 416 at 428-429, CA; *Keppell v Bailey* (1834) 2 My & K 517.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(i) In general/197. General rights to water.

(3) RIGHTS TO WATER

(i) In general

197. General rights to water.

Water cannot in general form the subject matter of property¹. A person cannot bring a claim to recover possession of a pool or other piece of water as such, for water is a movable wandering thing which must of necessity continue common by the law of nature². No claim can be supported merely for taking water unless the water is contained in a cistern or some other vessel in which the person bringing the claim has placed it for his private use³. So long, however, as water remains upon the land where it first rises from the earth, the owner of that land alone has a right to appropriate it, for no one else can do so without committing a trespass. When, however, it has left that land the owner has no more power over it or interest in it than a stranger⁴.

1 *Race v Ward* (1855) 4 E & B 702 at 709 per Lord Campbell CJ; *Embrey v Owen* (1851) 6 Exch 353 at 369-370; *Ballard v Tomlinson* (1885) 29 ChD 115 at 121, CA; *Williams v Morland* (1824) 2 B & C 910 at 917; cf *Rawstron v Taylor* (1855) 11 Exch 369; *Mason v Hill* (1833) 5 B & Ad 1.

2 2 Bl Com (14th Edn) 18; *Race v Ward* (1855) 4 E & B 702. He must sue, if at all, for recovery of the land covered by the water.

3 *Race v Ward* (1855) 4 E & B 702; *Embrey v Owen* (1851) 6 Exch 353 at 369 per Parke B; *Mason v Hill* (1833) 5 B & Ad 1 at 24, cited in *Embrey v Owen* (1851) 6 Exch 353 at 369.

4 *Race v Ward* (1855) 4 E & B 702 at 709.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(i) In general/198. Grant of watercourse.

198. Grant of watercourse.

It follows from the rules as to the ownership of water¹ that the grant of a watercourse does not mean the grant of the water itself. It may mean any one of three things, namely a grant of the easement or the right to the running of water; a grant of the channel-pipe or drain which contains the water; or a grant of the land over which the water flows². The meaning in the case of each particular grant is to be drawn from the context, and if there is no context from which the meaning can be gathered the word 'watercourse' prima facie means an easement³.

¹ See PARA 197 ante.

² *Taylor v St Helens Corpn* (1877) 6 ChD 264 at 271, CA.

³ *Taylor v St Helens Corpn* (1877) 6 ChD 264 at 271, CA. The words 'convenient watercourse' in the Prescription Act 1832 s 8 (as amended) (see PARA 102 ante), are commonly supposed to be a misprint by the King's Printer of the day for 'easement or watercourse' and are not otherwise intelligible: *Wright v Williams* (1836) Tyr & Gr 375 at 390.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(i) In general/199. Distinction between natural and acquired right to water.

199. Distinction between natural and acquired right to water.

An easement relating to water or watercourses must be carefully distinguished from the natural right to water which is enjoyed as an incident to the ownership of land¹. The easement is a right enjoyed over and above the natural right, and the burden of the easement involves, in general, a diminution of or detraction from the natural right².

1 As to the natural right to water see PARA 202 post; for the law generally as to water and watercourses see WATER AND WATERWAYS.

2 See PARA 20 ante; *Wright v Howard* (1823) 1 Sim & St 190.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(i) In general/200. Nature of easement.

200. Nature of easement.

Easements which relate to water and watercourses are very varied¹. Their nature depends largely upon the distinction, all-important for this purpose, between water flowing in a natural channel and water flowing in an artificial watercourse².

¹ As to rights to draw water from wells and springs on the land of another person see *Race v Ward* (1855) 4 E & B 702; *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015. As to the right to discharge rain water on another's land from spouts or eaves see *Harvey v Walters* (1873) LR 8 CP 162; *Baten's Case* (1610) 9 Co Rep 53b; 2 Roll Abr 140; Com Dig, Action upon the Case for a Nuisance (A). As to increasing the velocity of the stream see *Williams v Morland* (1824) 2 B & C 910. As to an easement of water for turning a mill wheel see *Carlisle Corp v Blamire* (1807) 8 East 487. As to right to allow water to fall from land of one ownership upon land of a different ownership see *Gibbons v Lenfestey* (1915) 84 LJPC 158. As to right to pass along the bank of a millstream to repair banks and cut weeds see *Long v Gowlett* [1923] 2 Ch 177. As to opening sluices to avoid flood see *Simpson v Godmanchester Corp* [1897] AC 696, HL. As to easements allowing pollution see PARA 215 post. As to the general rights of riparian owners see BOUNDARIES; WATER AND WATERWAYS.

² *Greatrex v Hayward* (1853) 8 Exch 291 at 293; *Wood v Waud* (1849) 3 Exch 748; *Rameshur Pershad Narain Singh v Koonj Behari Pattuk* (1878) 4 App Cas 121 at 126, PC; *M'Evoy v Great Northern Rly Co* [1900] 2 IR 325 at 333, CA; *Burrows v Lang* [1901] 2 Ch 502 at 507.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(i) In general/201. Natural and artificial channels.

201. Natural and artificial channels.

With regard to easements relating to water flowing in a natural channel the distinction between the easement and the natural right to water is of first importance, but this distinction has little bearing with regard to easements relating to water flowing in an artificial channel, because they depend in general upon some agreement, express or implied, which excludes all question of natural rights¹.

¹ *Kensit v Great Eastern Rly Co* (1884) 27 ChD 122 at 133-134, CA, per Cotton LJ: 'it seems to me to be a contradiction in terms to say that any natural rights can ever be acquired in an artificial cut'. See, however, *Sutcliffe v Booth* (1863) 32 LJQB 136, where it was held that although the particular watercourse might have been artificial, it might still have been originally made under circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had if it had been a natural stream; *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427; and see PARA 208 et seq post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(ii) Natural Right to Water/202. Natural right to accustomed flow of water.

(ii) Natural Right to Water

202. Natural right to accustomed flow of water.

Every owner of land adjacent to water running in a defined natural channel has at common law a right to have a continuance of the accustomed flow of water, both as regards quantity and quality¹. This right, which is generally called a natural right², is fully discussed elsewhere in this work³. It is an incident arising by law from the ownership of each plot of land over or through which the water passes, and consequently there is a mutual benefit to and mutual burden upon each owner⁴, and a right of action exists in respect of any unreasonable and therefore unauthorised use of the common benefit⁵.

1 *John Young & Co v Bankier Distillery Co*[1893] AC 691, HL. Quality includes temperature: *John Young & Co v Bankier Distillery Co* supra at 700; *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd*[1952] 1 All ER 1326 at 1331; on appeal [1953] Ch 149, [1953] 1 All ER 179, CA.

2 *I*e arising by the law of nature (*jure naturae*). See *Sury v Pigot* (1626) Poph 166; and WATER AND WATERWAYS vol 100 (2009) PARA 86.

3 See WATER AND WATERWAYS vol 100 (2009) PARA 86 et seq.

4 *Wright v Howard* (1823) 1 Sim & St 190 at 203; *Burrows v Lang*[1901] 2 Ch 502 at 506; *John Young & Co v Bankier Distillery Co*[1893] AC 691, HL.

5 See eg *John Young & Co v Bankier Distillery Co*[1893] AC 691, HL. Water flowing underground in a known and defined channel is subject to the same rules of law as water flowing on the surface in a known channel: see WATER AND WATERWAYS vol 100 (2009) PARA 86 et seq.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(ii) Natural Right to Water/203. Reasonable user.

203. Reasonable user.

It is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application, as the question is in each case one of degree, depending to a large extent on the magnitude of the stream as compared with the amount of water abstracted¹. However, there is usually little difficulty in determining whether a particular case falls within the permitted limits or not². A riparian owner may use the water for ordinary or primary purposes for his domestic wants and the general and usual requirements of his tenement, and he may also, subject to compliance with certain conditions, use it for other purposes, sometimes called extraordinary or secondary purposes, provided they are connected with or incident to his land³.

1 *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697 at 704. As to the statutory restrictions on the rights of a riparian owner see the Water Resources Act 1991; and WATER AND WATERWAYS.

2 *Embrey v Owen* (1851) 6 Exch 353 at 372 per Parke B; and see WATER AND WATERWAYS.

3 *McCartney v Londonderry and Lough Swilly Rly Co Ltd* [1904] AC 301 at 307, HL; *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697 at 704.

UPDATE

203 Reasonable user

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(ii) Natural Right to Water/204. Limits of user.

204. Limits of user.

In the ordinary or primary use of the water the riparian owner may, in the exercise of these ordinary rights, temporarily exhaust the water altogether¹. In the exercise of the right to take water for extraordinary or secondary purposes his user must be reasonable, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character². In no case may he use the water for purposes foreign to or unconnected with his riparian tenement³.

1 *McCartney v Londonderry and Lough Swilly Rly Co Ltd* [1904] AC 301 at 307, HL.

2 *McCartney v Londonderry and Lough Swilly Rly Co Ltd* [1904] AC 301 at 307, HL; *John Young & Co v Bankier Distillery Co* [1893] AC 691 at 698, HL; *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697. See also WATER AND WATERWAYS vol 100 (2009) PARA 94.

3 *McCartney v Londonderry and Lough Swilly Rly Co Ltd* [1904] AC 301 at 306, HL.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(ii) Natural Right to Water/205. Water in unascertained or indefinite channel.

205. Water in unascertained or indefinite channel.

Different considerations apply to the cases of water flowing in an unascertained channel, or water percolating through the earth in an indefinite channel¹. In these cases a landowner has no right at common law to the continuance of the flow². Consequently if a landowner does any act upon his own land which results in preventing the access to his neighbour's land of water which formerly came there by an unascertained channel or by mere percolation, he has committed no actionable wrong³. A purported reservation of water percolating in land sold to another is ineffective; but a reservation of a right to enter on it and exercise all necessary rights to enable the vendor to obtain water from it for the benefit of land retained by the vendor is a reservation of a valid easement⁴.

An occupier of land has no cause of action against the occupier of higher adjacent land for permitting the passage of natural, unchannelled water over or through the higher to the lower land, but neither is he under any obligation to receive such water and he is entitled to take steps consonant with his reasonable use of the land to prevent it from entering thereon, albeit that damage is thereby occasioned to the occupier of the higher land⁵.

The landowner is entitled to interfere with the surface water on his land, even if the result may be to prevent the water eventually reaching a defined channel, and even if another person may be entitled to the flow of the water in the defined channel⁶.

1 See WATER AND WATERWAYS vol 100 (2009) PARA 86 et seq.

2 See eg *Acton v Blundell* (1842) 12 M & W 324, Ex Ch; *Bradford Corp'n v Ferrand* [1902] 2 Ch 655, DC.

3 See *Bradford Corp'n v Ferrand* [1902] 2 Ch 655, DC; and see WATER AND WATERWAYS vol 100 (2009) PARAS 88, 105.

4 *Re Simeon and Isle of Wight RDC* [1937] Ch 525, [1937] 3 All ER 149. A covenant by the purchaser not to do anything on the land sold whereby the vendor's existing and future means of supply of water from it to the vendor's retained land or waterworks should be diminished or its purity impaired is a valid covenant enuring for the benefit of the vendor's successors in title and conferring on him and them an equitable interest in the land sold: *Re Simeon and Isle of Wight RDC* supra.

5 *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd* [1987] QB 339, [1987] 1 All ER 637.

6 *Broadbent v Ramsbotham* (1856) 11 Exch 602; and see WATER AND WATERWAYS.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(iii) Easements relating to Natural Watercourses/206. Acquisition of easements.

(iii) Easements relating to Natural Watercourses

206. Acquisition of easements.

Easements in respect of water in natural watercourses may be acquired by express grant¹, by implication of law² or under the doctrine of prescription³.

1 See eg *Carlisle Corpn v Blamire* (1807) 8 East 487; *Nuttall v Bracewell* (1866) LR 2 Exch 1. See also *John White & Sons v White* [1906] AC 72, HL; *Schwann v Cotton* [1916] 2 Ch 459, CA (water easement created by devise).

2 See eg *Sury v Pigot* (1626) Poph 166; *Canham v Fisk* (1831) 2 Cr & J 126; *Wardle v Brocklehurst* (1860) 8 WR 241, Ex Ch; *Westwood v Heywood* [1921] 2 Ch 130.

3 See eg *Cooper v Barber* (1810) 3 Taunt 99; *Holker v Porritt* (1875) LR 10 Exch 59 at 62, Ex Ch.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(iii) Easements relating to Natural Watercourses/207. Rights arising from easement.

207. Rights arising from easement.

Easements in respect of water in natural watercourses may entitle the owner of the dominant tenement to interfere with the flow by taking water for purposes which would not be lawful as against other riparian owners had his right merely rested upon his natural rights as a riparian owner¹. He may also acquire as an easement a right to change the state of the water², or to divert the water so as entirely to deprive other riparian owners of their beneficial enjoyment of the water³, and to discharge the water of the stream upon the land of another person⁴.

1 *Sampson v Hoddinott* (1857) 1 CBNS 590 at 611 (affd 3 CBNS 596); *Wright v Howard* (1823) 1 Sim & St 190; *Dalton v Angus* (1881) 6 App Cas 740 at 792, HL; *John Young & Co v Bankier Distillery Co* [1893] AC 691 at 698, HL; *McCartney v Londonderry and Lough Swilly Rly Co Ltd* [1904] AC 301 at 313, HL. The implication from the language used by Lord Cairns LC in *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) LR 7 HL 697 at 705, and by Lord Lindley in *McCartney v Londonderry and Lough Swilly Rly Co Ltd* supra at 313 seems to be that a prescriptionary easement might become established for abstraction of water for purposes not connected, or only remotely or indirectly connected, with the dominant tenement. If so, such an easement would be anomalous in so far as it would lack the characteristic requirement that an easement must be appurtenant and beneficial to the enjoyment of the dominant tenement which it serves. See also *Attwood v Llay Main Collieries Ltd* [1926] Ch 444 at 459, 460.

As to the statutory restrictions on the abstraction of water see the Water Resources Act 1991; and WATER AND WATERWAYS. An existing easement is not extinguished by ss 24, 26(1), 27, 28(2)(b), 29, 32 (as amended) (restrictions on, and rights of, abstraction and impounding: see WATER AND WATERWAYS vol 100 (2009) PARA 214 et seq), but cannot be exercised without a licence: *Cargill v Gotts* [1981] 1 All ER 682, [1981] 1 WLR 441, CA (decided under the Water Resources Act 1963 ss 23, 24 (repealed)).

2 *Baxendale v McMurray* (1867) 2 Ch App 790; *Wood v Sutcliffe* (1851) 2 Sim NS 163; *Carlyon v Lovering* (1857) 1 H & N 784; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478; *Wood v Waud* (1849) 3 Exch 748; *Wright v Williams* (1836) 1 M & W 77; *McIntyre Bros v McGavin* [1893] AC 268, HL; *Eastwood Bros Ltd v Honley UDC* [1901] 1 Ch 645, CA.

3 *Mason v Shrewsbury and Hereford Rly Co* (1871) LR 6 QB 578 at 586-587; *Cooper v Barber* (1810) 3 Taunt 99.

4 *Mason v Shrewsbury and Hereford Rly Co* (1871) LR 6 QB 578 at 587. Rights of this kind are in general, however, rights in respect of artificial watercourses: see PARA 208 et seq post. For cases relating to easements in natural watercourses see *Cox v Matthews* (1673) 1 Vent 237 at 239; *Bealey v Shaw* (1805) 6 East 208 (water taken from river to supply a mill); *Sampson v Hoddinott* (1857) 1 CBNS 590 (affd 3 CBNS 596); *Dewhirst v Wrigley* (1834) Coop Pr Cas 329 (obstruction of water restrained); *Beeston v Weate* (1856) 5 E & B 986 (easement established for damming a brook to get water for irrigation and farm purposes); *Murgatroyd v Robinson* (1857) 7 E & B 391 (claim to throw cinders into river); *Nuttall v Bracewell* (1866) LR 2 Exch 1 (acknowledgment of right to obstruct); *Holker v Porritt* (1875) LR 10 Exch 59, Ch (artificial division of stream); *Roberts v Fellowes* (1906) 94 LT 279 (claim to abstract percolating water); *John White & Sons v White* [1906] AC 72, HL (prescriptive right to abstract water for use of a mill). See also *Gibbons v Lenfestey* (1915) 84 LJPC 158.

UPDATE

207 Rights arising from easement

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement

and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(iv) Artificial Watercourses/208. No natural rights in artificial watercourse.

(iv) Artificial Watercourses

208. No natural rights in artificial watercourse.

There is no natural right to water in an artificial watercourse¹. However, a watercourse, though artificial in its nature, may have been originally made under such circumstances, and have been so used, as to give to persons through whose land it flows all the rights which they would have had as riparian owners had the stream in fact been a natural one². Where an artificial channel passes through the land of several proprietors and water flows in it to serve the purposes of a lower proprietor, the proper grant to presume in the absence of evidence is the grant of a watercourse, and prima facie every proprietor of land on the banks of the channel is entitled to that half of the bed of the channel which adjoins his land³.

1 *Kensit v Great Eastern Rly Co*(1884) 27 ChD 122 at 133-134, CA; *Sampson v Hoddinott* (1857) 1 CBNS 590 (affd 3 CBNS 596); *Rameshwar Pershad Narain Singh v Koonj Behari Pattuk*(1878) 4 App Cas 121 at 126, PC; *Burrows v Lang*[1901] 2 Ch 502 at 505-506; *Wood v Waud*(1849) 3 Exch 748.

2 *Sutcliffe v Booth* (1863) 32 LJQB 136 at 139 per Wightman J. See also *Baily & Co v Clark, Son and Morland*[1902] 1 Ch 649 at 664, CA; *Nuttall v Bracewell*(1866) LR 2 Exch 1. *McCartney v Londonderry and Lough Swilly Rly Co Ltd*[1904] AC 301, HL, was argued in the House of Lords upon the hypothesis that the stream was a natural stream although the trial judge found as a fact that it was an artificial watercourse: see at 303 per Lord Halsbury LC. See also *Rance v Elvin* (1985) 50 P & CR 9, CA (plaintiff (now known as the 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18) had an easement for the passage of water coming through pipes on defendant's land, but this could not impose an obligation on the defendant to ensure that any water came into the pipes; however, the plaintiff was under an implied obligation to reimburse the defendant for its expenditure on water supplied to the plaintiff); applied to a supply of electricity in *Duffy v Lamb (t/a Vic Lamb Developments)* (1997) 75 P & CR 364, [1997] NPC 52, CA.

3 *Whitmores (Edenbridge) Ltd v Stanford*[1909] 1 Ch 427 at 434-435 per Eve J (mill stream). See also *Lewis v Meredith*[1913] 1 Ch 571.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(iv) Artificial Watercourses/209. Easement in artificial watercourse.

209. Easement in artificial watercourse.

The existence of every artificial watercourse, unless constructed and used by a landowner solely upon his own land¹, involves the existence of an easement. Such an easement may be created by express grant², or may arise by implication of law³ or by prescription⁴. It may be granted or implied in respect of an artificial watercourse constructed upon the maker's own land⁵, or in respect of a watercourse constructed through the land of another person, and, in this case, whether the soil of the watercourse is acquired by the person making it⁶, or the easement arises by necessary implication from the permission to make it given by the owner of the soil⁷.

1 *Bunting v Hicks* (1894) 70 LT 455, CA.

2 See eg *Finlinson v Porter* (1875) LR 10 QB 188, DC (where the question of easement or common drain was undecided); *Wood v Saunders* (1875) 10 Ch App 582 (sewer); *Outram v Maude* (1881) 17 ChD 391 (underground goit or drain). Cf *Roberts v Rose* (1865) LR 1 Exch 82, where a licence to construct a watercourse was granted by parol. The licence being subsequently revoked, the licensor was held entitled to obstruct the watercourse. See also *Nuttall v Bracewell* (1866) LR 2 Exch 1.

3 See eg *Watts v Kelson* (1871) 6 Ch App 166; *Bunting v Hicks* (1894) 70 LT 455, CA; *Hall v Lund* (1863) 1 H & C 676.

4 *Magor v Chadwick* (1840) 11 Ad & El 571; *Wood v Waud* (1849) 3 Exch 748; *Blackburne v Somers* (1879) 5 LR Ir 1; *Rameshur Pershad Narain Singh v Koonj Behari Pattuk* (1878) 4 App Cas 121, PC; *Powell v Butler* (1871) IR 5 CL 309; *Brown v Dunstable Corp* [1899] 2 Ch 378; *Bunting v Hicks* (1894) 70 LT 455, CA; *Wright v Williams* (1836) 1 M & W 77; *A-G v Copeland* [1902] 1 KB 690, CA.

5 See eg *RH Buckley & Sons Ltd v N Buckley & Sons* [1898] 2 QB 608, CA.

6 *Lord Dynevor v Tennant* (1888) 13 App Cas 279, HL; *Taylor v St Helens Corp* (1877) 6 ChD 264, CA; *Burrows v Lang* [1901] 2 Ch 502; and see *Simmons v Midford* [1969] 2 Ch 415, [1969] 2 All ER 1269; and PARA 35 ante.

7 *M'Evoy v Great Northern Rly Co* [1901] 2 IR 325 at 333, CA; *Burrows v Lang* [1901] 2 Ch 502 at 508-509; *Magor v Chadwick* (1840) 11 Ad & El 571.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(iv) Artificial Watercourses/210. Express grant of easement in artificial watercourse.

210. Express grant of easement in artificial watercourse.

Where there is in existence an express grant of an easement or an express agreement relative to the construction and continuance of an artificial watercourse, the rights of all parties depend, of course, upon its terms¹. The rights of some of the parties may, however, be implied from the circumstances surrounding the execution of the agreement. In general, in such a case, rights in the watercourse will not readily accrue apart from those given by the agreement².

¹ *Sharp v Waterhouse* (1857) 3 Jur NS 1022. See also *Key v Neath RDC* (1906) 95 LT 771, CA; *Simmons v Midford* [1969] 2 Ch 415, [1969] 2 All ER 1269. Cf *Trailfinders Ltd v Razuki* [1988] 2 EGLR 46, [1988] 30 EG 59 (reservation in lease of free passage of, inter alia, electric current through cables on land did not entitle claimant to lay new computer cable though he would have been entitled to repair or replace existing cables).

² *Mason v Shrewsbury and Hereford Rly Co* (1871) LR 6 QB 578 at 587; *Gaved v Martyn* (1865) 19 CBNS 732; *Wood v Waud* (1849) 3 Exch 748; *Sampson v Hoddinott* (1857) 1 CBNS 590; affd 3 CBNS 596; *Staffordshire and Worcestershire Canal Navigation (Proprietors) v Birmingham Canal Navigation (Proprietors)* (1866) LR 1 HL 254; *Greatrex v Hayward* (1853) 8 Exch 291; *Arkwright v Gell* (1839) 5 M & W 203 at 231; *Burrows v Lang* [1901] 2 Ch 502 at 508, 509; *M'Evoy v Great Northern Rly Co* [1900] 2 IR 325 at 333, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(iv) Artificial Watercourses/211. Prescriptive rights in artificial watercourse.

211. Prescriptive rights in artificial watercourse.

Under the doctrine of prescription an easement in an artificial watercourse will be more readily established where the watercourse appears to have been created for a permanent purpose, and to have been intended to continue permanently, than where the watercourse appears to have been intended for a temporary purpose only¹. The court therefore inquires carefully into the character of the watercourse, especially if there is a lease existing between the parties, with a view of finding whether it was intended that the watercourse should last for all time, or whether it was a temporary convenience the construction of which was perfectly consistent with the notion that it was to be enjoyed only so long as the parties continued their relation of landlord and tenant².

1 *Baily & Co v Clark, Son and Morland Ltd* [1902] 1 Ch 649 at 668, CA; *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427; *Wood v Waud* (1849) 3 Exch 748 at 778; *Greatrex v Hayward* (1853) 8 Exch 291; *Burrows v Lang* [1901] 2 Ch 502 at 507 per Farwell J; *Mason v Shrewsbury and Hereford Rly Co* (1871) LR 6 QB 578 at 584 per Blackburn J. See also *Sutcliffe v Booth* (1863) 32 LJQB 136; *Roberts v Richards* (1881) 44 LT 271 (on appeal 51 LJ Ch 944); *Bunting v Hicks* (1894) 70 LT 455, CA; *Schwann v Cotton* [1916] 2 Ch 459, CA (underground pipe).

2 *Chamber Colliery Co v Hopwood* (1886) 32 ChD 549 at 558-559, CA, per Bowen LJ.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(iv) Artificial Watercourses/212. Artificial watercourse for temporary purposes.

212. Artificial watercourse for temporary purposes.

A prescriptive right to an easement in an artificial watercourse constructed only for a temporary purpose cannot in general be gained as against the maker of the watercourse or his successors in title¹. One of the reasons for this is that the enjoyment of the accommodation afforded by the watercourse to persons other than the maker is generally of a permissive character², so that there is no enjoyment as of right which is essential to the success of every prescriptive claim to an easement of water³.

In this respect the meaning of 'temporary purpose' is not confined to a purpose that lasts in fact for a few years only, but includes a purpose which is temporary in the sense that it may, within the reasonable contemplation of the parties, come to an end⁴. A watercourse is made for a temporary purpose within this meaning if it is not intended to be a permanent alteration of the face of nature, but merely a temporary alteration for the purpose of and coextensive with the carrying on of a particular business⁵.

1 *Arkwright v Gell* (1839) 5 M & W 203.

2 *Burrows v Lang* [1901] 2 Ch 502 at 510, 511; *Hanna v Pollock* [1900] 2 IR 664, CA; *Chamber Colliery Co v Hopwood* (1886) 32 ChD 549, CA

3 *Chamber Colliery Co v Hopwood* (1886) 32 ChD 549 at 558, CA.

4 *Burrows v Lang* [1901] 2 Ch 502 at 508 per Farwell J.

5 *Burrows v Lang* [1901] 2 Ch 502 at 508 per Farwell J, where it is said that if a person makes a watercourse leading to a mill pond for the use of this own mill on his own land, this is for a temporary purpose, because it is limited to the period for which he uses the mill; and similarly if a person pumps water from his mines for the purpose of draining them, that is a temporary purpose, as it is limited by the duration of the workings.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(iv) Artificial Watercourses/213. Right to discharge water.

213. Right to discharge water.

The rights claimed as easements in respect of artificial watercourses are usually either a right to continue the enjoyment of the discharge onto the claimant's land of an artificial flow of water from a watercourse made by someone else above¹, or a right to discharge water flowing through an artificial watercourse upon the land of someone below².

The mere discharge of water by an upper proprietor upon the land of a lower proprietor may easily establish a right on the part of the upper proprietor to go on discharging, because so long as the discharge continues there is a submission on the part of the lower proprietor to proceedings which indicate a claim of right on the part of the proprietor above³, but it is difficult for the lower proprietor to establish a right to have the flow continued⁴.

1 *Chamber Colliery Co v Hopwood* (1886) 32 ChD 549 at 558, CA, per Bowen LJ; see eg *Ivimey v Stocker* (1866) 1 Ch App 396. Cf *Greatrex v Hayward* (1853) 8 Exch 291.

2 *Brown v Dunstable Corp* [1899] 2 Ch 378; *A-G v Dorking Union Guardians* (1882) 20 ChD 595 at 601, CA; *Carlyon v Lovering* (1857) 1 H & N 784; *Wright v Williams* (1836) 1 M & W 77. See also *Longton v Winwick Asylum Visitors Committee* (1911) 75 JP 348; settled on appeal (1912) 76 JP 113, CA.

3 *Chamber Colliery Co v Hopwood* (1886) 32 ChD 549, CA. See also *Gibbons v Lenfestey* (1915) 84 LJPC 158.

4 *Chamber Colliery Co v Hopwood* (1886) 32 ChD 549 at 558, CA, where Bowen LJ pointed out that it would be very difficult to make out that because a person's pump had dripped on to his neighbour's land the latter had a right after 20 years to say that the pump must go on leaking. See *Greatrex v Hayward* (1853) 8 Exch 291, where it was held that the flow of water from a drain for 20 years, for the purposes of agricultural improvements, did not give a right to a neighbour which would preclude the proprietor from altering the level of his drains for the greater improvement of his land. See also *Wood v Waud* (1849) 3 Exch 748 at 778; *Arkwright v Gell* (1839) 5 M & W 203; *Mason v Shrewsbury and Hereford Rly Co* (1871) LR 6 QB 578. Cf *Hanna v Pollock* [1900] 2 IR 664, CA; *Magor v Chadwick* (1840) 11 Ad & El 571; *Gaved v Martyn* (1865) 19 CBNS 732.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(v) Pollution/214. No general right to pollute.

(v) Pollution

214. No general right to pollute.

In the absence of statutory authority¹ a person may not² pollute the water of a natural watercourse to the prejudice of other persons entitled to the use of the water³. A person who has acquired a right to the use of the water in a watercourse or subterranean water can prevent the pollution of the water, whether he has acquired that right under the doctrine of prescription or otherwise⁴.

1 If the statutory authority is to do a thing, the thing authorised must be such as inevitably leads to its pollution: see eg *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All ER 1326 at 1339; affd [1953] Ch 149, [1953] 1 All ER 179, CA (statutory right of electricity undertakers to abstract and use water for condensing purposes on condition of returning it to river in such a condition as not to injure fish; water returned at a temperature not complying with the condition).

2 He may be liable in a civil claim if he does pollute the water. Statutory provision has been made for maintaining the wholesomeness of rivers and inland and coastal waters, under which pollution may be an offence against the criminal law: see the Water Resources Act 1991 Pt III Ch II (ss 85-91) (as amended); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 291 et seq.

3 *Wood v Waud* (1849) 3 Exch 748; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478; *Mason v Hill* (1833) 5 B & Ad 1; *Goldsmid v Tunbridge Wells Improvement Comrs* (1866) 1 Ch App 349; *John Young & Co v Bankier Distillery Co* [1893] AC 691, HL; *Whaley v Laing* (1857) 2 H & N 476; on appeal sub nom *Laing v Whaley* (1858) 3 H & N 675, Ex Ch; *Ballard v Tomlinson* (1885) 29 ChD 115, CA; *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, CA. A local authority may be restrained from polluting (*Jones v Llanrwst UDC* [1911] 1 Ch 393), at any rate where it has not statutory justification (*Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All ER 1326; affd [1953] Ch 149, [1953] 1 All ER 179, CA. Cf *Hodgkinson v Ennor* (1863) 4 B & S 229; *Womersley v Church* (1867) 17 LT 190). See also *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL. As to pollution generally see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH; WATER AND WATERWAYS.

4 *Magor v Chadwick* (1840) 11 Ad & El 571; cf *Cawkwell v Russell* (1856) 26 LJ Ex 34.

UPDATE

214-215 No general right to pollute, Acquisition of right to pollute

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(v) Pollution/215. Acquisition of right to pollute.

215. Acquisition of right to pollute.

A right to pollute water may be acquired by statute¹, by express grant², by implication of law³ or under the doctrine of prescription⁴. The user relied on for the presumption of a grant must not be tainted by illegality, as for example by contravening statutory prohibitions⁵. Conversely the acquisition of a prescriptive easement to pollute is no answer to the charge of an offence under the relevant legislation⁶. When acquired by prescription the right must be restricted to the limits of it when the period of prescription commenced; any substantial increase in the amount of pollution after that time is unlawful, and the wrongdoer may be restrained by injunction even though the grant of the injunction may cause a total prohibition of the pollution⁷. The prescription period does not begin to run until actual damage has been suffered⁸ and there can be no prescription when the pollution is unknown to the riparian owner⁹. Certainty and uniformity of use are required to establish a prescriptive right¹⁰. The statutory prohibitions¹¹ leave little scope for the acquisition of a right to pollute otherwise than by statute.

Where the right has been acquired in respect of the manufacture of a particular article or class of goods it includes the right to use any proper materials for the manufacture of those goods so long as that does not increase the pollution¹², but it does not give the right of substituting the manufacture of articles or goods different from those in respect of which the right was acquired¹³.

1 See PARA 214 note 1 ante.

2 See PARA 48 ante. A grant in such a case may be ineffective, however, unless all lower riparian owners affected join in it.

3 *Hall v Lund* (1863) 1 H & C 676.

4 *Wood v Waud* (1849) 3 Exch 748; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478; *Wright v Williams* (1836) 1 M & W 77; *A-G v Dorking Union Guardians* (1882) 20 ChD 595 at 601, CA; *Baxendale v McMurray* (1867) 2 Ch App 790; *McIntyre Bros v McGavin* [1893] AC 268, HL. Quaere whether it is competent for a sewerage undertaker, having regard to its statutory obligations to deal effectively with sewage, to make such a grant as would require to be presumed in support of a prescriptive claim to discharge a polluting trade effluent into its sewers: see *Liverpool Corp v H Coghill & Son Ltd* [1918] 1 Ch 307 at 315. See also *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, [1987] 2 EGLR 227 (no prescription where riparian owner did not know of pollution; prescription period would begin not with commencement of pollution but on occurrence of damage)

5 *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268; *Green v Matthews & Co* (1930) 46 TLR 206. See also *Neaverson v Peterborough RDC* [1902] 1 Ch 557, CA (where allegations of lost modern grants of right to pollute were rejected); but see *Millington v Griffiths* (1874) 30 LT 65 at 68 per Brett J. As to the statutory prohibitions see the Water Resources Act 1991 Pt III Ch II (ss 85-91) (as amended); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 291 et seq.

6 *Butterworth v West Riding of Yorkshire Rivers Board* [1909] AC 45, HL.

7 *Blackburne v Somers* (1879) 5 LR Ir 1; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478; cf *McIntyre Bros v McGavin* [1893] AC 268, HL; and see *Somersetshire Drainage Comrs v Bridgwater Corp* (1899) 81 LT 729, HL, where, under a local Act forbidding pollution except by persons having a legal right to pollute at the passing of the Act, it was held that such persons might continue to do so at an increased rate. See further *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268; *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, [1987] 2 EGLR 227. A progressive increase in pollution is fatal to a claim to a prescriptive right to pollute: *Hulley v Silversprings Bleaching and Dyeing Co Ltd* supra. In *Murgatroyd v Robinson* (1857) 7 E & B 391 it was held that the right did not begin to be acquired until the other party suffered some damage.

8 *Goldsmid v Tunbridge Wells Improvement Comrs* (1866) 1 Ch App 349; *Liverpool Corpn v H Coghill & Son Ltd* [1918] 1 Ch 307; *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, [1987] 2 EGLR 227.

9 *Liverpool Corpn v H Coghill & Son Ltd* [1918] 1 Ch 307; *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, [1987] 2 EGLR 227.

10 *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268; *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, [1987] 2 EGLR 227.

11 See note 5 supra.

12 *Baxendale v McMurray* (1867) 2 Ch App 790 (vegetable fibre substituted for rags in manufacture of paper); see *McIntyre Bros v McGavin* [1893] AC 268, HL.

13 *Clarke v Somersetshire Drainage Comrs* (1888) 57 LJMC 96 (changing business from fellmonger to leatherboard manufacturer).

UPDATE

214-215 No general right to pollute, Acquisition of right to pollute

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(v) Pollution/216. Interference with public right.

216. Interference with public right.

No person can acquire a right by prescription to pollute water so as to cause injury to public health, or to any public right, such as fishing in tidal waters¹.

¹ *Blackburne v Somers* (1879) 5 LR Ir 1; *Hobart v Southend-on-Sea Corpn* (1906) 75 LJKB 305; on appeal 22 TLR 530, CA; *Foster v Warblington UDC* [1906] 1 KB 648, CA; *Owen v Faversham Corpn* (1908) 73 JP 33, CA; *R v Medley* (1834) 6 C & P 292; *R v Cross* (1812) 3 Camp 224 (no length of time will legitimate a public nuisance); *A-G v Cockermouth Local Board* (1874) LR 18 Eq 172; *A-G v Birmingham, Tame and Rea District Drainage Board* [1910] 1 Ch 48, CA (varied without affecting this point [1912] AC 788, HL); *A-G v Burridge, Portsmouth Harbour Case* (1822) 10 Price 350 (even the Crown cannot authorise a public nuisance); *A-G v Barnsley Corpn* [1874] WN 37; *Traill v McAllister* (1890) 25 LR Ir 524; and see *A-G v Richmond* (1866) LR 2 Eq 306 at 311.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(v) Pollution/217. Non-user.

217. Non-user.

A prescriptive right to pollute, once acquired, cannot be lost by any subsequent act not amounting to a surrender, though it may be abandoned; mere non-user is in itself not sufficient to prove an intention to abandon, intention to abandon being a question of fact in each case¹.

¹ *French Hoek Comrs v Hugo* (1885) 10 App Cas 336, PC; *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478, where evidence that works from which pollution originated had not been used for over 20 years and had become ruins was held sufficient.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(v) Pollution/218. Pollution after sale.

218. Pollution after sale.

Where a riparian owner who has acquired a right to pollute sells any part of his riparian land he is liable to be restrained by his purchaser from polluting the water unless he reserved in his grant a right to do so, for the right to pollute is not an easement of necessity¹.

¹ *Crossley & Sons Ltd v Lightowler* (1867) 2 Ch App 478.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(v) Pollution/219. Right to discharge water does not involve right to pollute.

219. Right to discharge water does not involve right to pollute.

If an owner of an easement to discharge water upon the servient tenement exceeds his rights by sending down polluted water the servient owner may stop the whole of the discharge, because it is impossible for him to separate the pure from the polluted water¹.

¹ *Cawkwell v Russell* (1856) 26 LJ Ex 34; *Charles v Finchley Local Board* (1883) 23 ChD 767; cf *Hill v Cock* (1872) 26 LT 185.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(vi) Repair or Alteration of Watercourses etc/220. Repair of watercourse.

(vi) Repair or Alteration of Watercourses etc

220. Repair of watercourse.

In general the owner of an easement in a watercourse may do all things necessary to repair it¹ and to keep it clean², whether the watercourse is natural³ or artificial⁴, and whether it is permanent⁵ or of a temporary nature⁶. Unless the easement is such as to entitle its owner to remove permanent accretions to the river bed, however, neither the owner of an easement of water in a natural watercourse nor a riparian owner is entitled to remove such accretions, although he may in general keep the river or stream free of vegetable and temporary obstructions which interfere with the enjoyment of his rights⁷. Probably a right of removing permanent accretions might be prescribed for⁸.

The grantor of an easement of drainage is not obliged to keep the drain in repair⁹.

In the absence of express agreement to the contrary a person who makes for his own use an artificial watercourse, whether upon his own or another's land, is bound to keep the watercourse in such a state of repair as will prevent damage to the servient tenement and, if he fails to do so, is responsible for any damage which may result¹⁰. This is the case even though the servient owner may have acquired a right to the use of the water¹¹.

1 *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321 at 322b; *Hodgson v Field* (1806) 7 East 613; *Goodhart v Hyett* (1883) 25 ChD 182; *Humphries v Cousins* (1877) 2 CPD 239 at 244, DC; *Liford's Case* (1614) 11 Co Rep 46b at 52a; cf *Sandgate Local Board v Leney* (1883) 25 ChD 183n; *Finlinson v Porter* (1875) LR 10 QB 188, DC; cf *Beeston v Weate* (1829) 5 E & B 986; *Bell v Twentyman* (1841) 1 QB 766; *Lord Egremont v Pulman* (1829) Mood & M 404; *Roberts v Fellowes* (1906) 94 LT 279.

2 *Hodgson v Field* (1806) 7 East 613; *Liford's Case* (1614) 11 Co Rep 46b; cf *Rhodes v Airedale Drainage Comrs* (1876) 1 CPD 380 at 392-393 per Lord Coleridge CJ (on appeal 1 CPD 402, CA); *R v Wharton* (1701) 12 Mod Rep 510; *Brown v Best* (1747) 1 Wils 174.

3 *Hodgson v Field* (1806) 7 East 613; *Humphries v Cousins* (1877) 2 CPD 239, DC.

4 *Goodhart v Hyett* (1883) 25 ChD 182; *Hodgson v Field* (1806) 7 East 613; *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321.

5 *Pomfret v Ricroft* (1669) 1 Wms Saund (6th Edn) 321.

6 *Hodgson v Field* (1806) 7 East 613.

7 *Withers v Purchase* (1889) 60 LT 819. See also *Long v Gowlett* [1923] 2 Ch 177.

8 *Withers v Purchase* (1889) 60 LT 819.

9 *Southwark London Borough Council v Mills* [2001] 1 AC 1 at 14, [1999] 4 All ER 449 at 458, HL, per Lord Hoffmann.

10 *RH Buckley & Sons Ltd v N Buckley & Sons* [1898] 2 QB 608, CA; and see *Rylands v Fletcher* (1868) LR 3 HL 330; *Nichols v Marsland* (1876) 2 ExD 1, CA; *Fletcher v Smith* (1877) 2 App Cas 781, HL. For a case involving a dispute over the cost of repairing pumping equipment etc where the dominant owner had a right to draw water from a borehole on the servient tenement from which both parties received their water see *Konstantinidis v Townsend* [2003] EWCA Civ 537, [2003] All ER (D) 314 (Mar), [2003] PLSCS 63.

11 *RH Buckley & Sons Ltd v N Buckley & Sons* [1898] 2 QB 608, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(3) RIGHTS TO WATER/(vi) Repair or Alteration of Watercourses etc/221. Alteration of watercourse.

221. Alteration of watercourse.

Unless some special right entitles him to do so neither a riparian owner nor an owner of an easement of water may alter the flow or bed of a river or stream so as to increase the burden of servitude upon the servient tenement, whether by increasing the strength of the current, altering its direction, or otherwise¹.

¹ *Frechette v La Cie Manufacturière de St Hyacinthe* (1883) 9 App Cas 170, PC; *Bickett v Morris* (1866) LR 1 Sc & Div 47, HL; *Palmer v Persse* (1877) 11 IR Eq 616; *Earl of Norbury v Kitchin* (1866) 15 LT 501; *Belfast Ropeworks Co v Boyd* (1887) 21 LR Ir 560; *Taylor v St Helens Corp*n (1877) 6 ChD 264, CA; *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL; *Withers v Purchase* (1889) 60 LT 819. See also *Massereene and Ferrard v Murphy* [1931] NI 192.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/222. No natural right to light.

(4) RIGHT TO LIGHT

(i) Nature of Right to Light

222. No natural right to light.

At common law the owner of land has no right to light, for the general doctrine of law with respect to land is that everyone may build upon or otherwise utilise his own land, regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and buildings of another person¹. Every person may open any number of windows looking over his neighbour's land² as the interference with a neighbour's privacy³, or with his prospect⁴, gives the latter no cause of action in the absence of other circumstances⁵. On the other hand the neighbour may, by putting erections on his own land, obstruct the light which would otherwise reach the other's windows⁶.

Neither at common law nor by way of easement in augmentation or variation of common law rights can there be a right to enjoy artificial light emanating from a neighbour's land. Light does not, however, become artificial or outside the meaning of the Prescription Act 1832⁷ merely because, starting as light from the sky, it reaches a dominant tenement after being filtered or refracted through glass⁸.

1 *Tapling v Jones* (1865) 11 HL Cas 290; *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL; see also *Higgins v Betts* [1905] 2 Ch 210 at 214.

2 *Chandler v Thompson* (1811) 3 Camp 80; *Aldred's Case* (1610) 9 Co Rep 57b at 58b.

3 *Turner v Spooner* (1861) 1 Drew & Sm 467; and see PARA 32 ante.

4 *A-G v Doughty* (1752) 2 Ves Sen 453; *Knowles v Richardson* (1670) 1 Mod Rep 55; *Fishmonger's Co v East India Co* (1752) 1 Dick 163. The obstruction of the view of business premises is not actionable: *Smith v Owen* (1866) 35 LJ Ch 317; *Butt v Imperial Gas Co* (1866) 2 Ch App 158; and see PARA 32 ante.

5 *Lord Manners v Johnson* (1875) 1 ChD 673 (privacy); *Piggott v Stratton* (1859) 1 De GF & J 33; *Western v MacDermott* (1866) 2 Ch App 72 (prospect).

6 *Tapling v Jones* (1865) 11 HL Cas 290 at 311 per Lord Cranworth. It is within the powers of a railway undertaking (*Bonner v Great Western Rly Co* (1883) 24 ChD 1, CA), or a local authority (*Paddington Corp v A-G* [1906] AC 1, HL) to erect a hoarding to prevent the acquisition of a right to light.

7 See the Prescription Act 1832 s 3 (amended by the Statute Law Revision (No 2) Act 1888).

8 *Tisdall v McArthur & Co (Steel and Metal) Ltd* [1951] IR 228 (light passing through a glass roof on the servient tenement can be the subject of an easement; and the light, in so far as it so passes, is not 'interrupted' for the purposes of the Prescription Act 1832 s 3 (as amended)); and see *Radcliffe v Duke of Portland* (1862) 3 Giff 702, where the evidence did not suffice to make out a case of noticeable interference with access of light by reason of the erection by the servient owner of a translucent screen on his boundary wall. It is quite a different (and untenable) proposition that a servient owner may justify interference with direct light by providing reflected or refracted light in lieu: *Smith v Evangelization Society (Incorporated) Trust* [1933] Ch 515 at 523, 536, CA; *Staight v Burn* (1869) 5 Ch App 163 at 166.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/223. Nature of easement of light.

223. Nature of easement of light.

The easement of light is a species of negative easement¹. It is a right acquired in augmentation of the ordinary rights incident to the ownership and enjoyment of land², and may be defined as a right which a person may acquire, as the owner or occupier of a building with windows or apertures, to prevent the owner or occupier of an adjoining piece of land from building or placing upon the latter's land anything which has the effect of 'illegally' obstructing or obscuring the light coming to the building of the owner of the easement³.

The easement of light used frequently to be spoken of as the easement of 'light and air', as though the right to light and the right to air were inseparably connected. They are, however, wholly distinct⁴, and although orders for the protection of light once included the protection of air as well, this practice has long since been abandoned⁵.

1 *Rowbotham v Wilson* (1857) 8 E & B 123 at 147, Ex Ch, per Bramwell B; affd (1860) 8 HL Cas 348; *Dalton v Angus* (1881) 6 App Cas 740 at 794-795, HL, per Lord Selborne LC and at 823 per Lord Blackburn. See also *Smith v Kenrick* (1849) 7 CB 515 at 565-566; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 185, HL, per Lord Macnaghten.

2 See *Higgins v Betts* [1905] 2 Ch 210 at 214.

3 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 185-186, HL, per Lord Macnaghten; *City of London Brewery Co v Tennant* (1873) 9 Ch App 212 at 216-217 per James LJ. The nature of the easement of light, when grounded upon a prescriptive title, was fully discussed by the House of Lords in *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; Lord Macnaghten at 189 pointed out that the reported cases on the question of light were not altogether consistent, and that there seemed to have been two divergent views, neither of which was absolutely accurate. One view is that the right acquired by so-called statutory prescription is a right to a continuance of the whole, or substantially the whole, light which has come to the windows during 20 years; the other that the right is limited to a sufficient quantity of light for ordinary purposes. It follows, therefore, that reliance cannot be placed upon many reported cases in 'the embarrassing chain of authority'. For cases where the first of these two divergent views was taken see PARA 225 note 7 post. The following cases, which for the most part either were expressly approved by the House of Lords in *Colls v Home and Colonial Stores Ltd* supra, or contain passages in agreement with the definitions contained in that case, may be referred to for judicial dicta from which the nature of the easement of light may best be ascertained: *Aldred's Case* (1610) 9 Co Rep 57b; *Fishmongers' Co v East India Co* (1752) 1 Dick 163; *Tapling v Jones* (1865) 11 HL Cas 290; *Back v Stacey* (1826) 2 C & P 465; *Clarke v Clark* (1865) 1 Ch App 16; *Robson v Whittingham* (1866) 1 Ch App 442; *Lanfranchi v Mackenzie* (1867) LR 4 Eq 421; *Kelk v Pearson* (1871) 6 Ch App 809; *City of London Brewery Co v Tennant* (1873) 9 Ch App 212 at 216-217 per James LJ; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA; *Scott v Pape* (1886) 31 ChD 554 at 571, CA (*Scott v Pape* supra was perhaps the high-water mark of equitable relief against interference with access of light and was criticised in *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 207, HL, per Lord Lindley); *Harris v De Pinna* (1886) 33 ChD 238, CA; *Kine v Jolly* [1905] 1 Ch 480, CA (affd sub nom *Jolly v Kine* [1907] AC 1, HL); *Ambler v Gordon* [1905] 1 KB 417; *Higgins v Betts* [1905] 2 Ch 210 at 214-215 per Farwell J; *Davis v Marrable* [1913] 2 Ch 421; *Sheffield Masonic Hall Co Ltd v Sheffield Corp'n* [1932] 2 Ch 17 at 21 per Maugham J; *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128, CA; *Frogmore Developments Ltd v Shirayama Shokusan Co* [2000] 1 EGLR 121.

4 As to the easement of air see PARA 249 et seq post.

5 *Baxter v Bower* (1875) 44 LJ Ch 625 at 628.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/224. Interference must amount to a nuisance.

224. Interference must amount to a nuisance.

When the owner of the dominant tenement has acquired the right to access of light he has a house or other building with an easement of light attached to it¹. It is a right to be protected from a particular form of nuisance², and unless the interference with the light coming to the dominant tenement amounts in law to an actionable nuisance, the owner of the dominant tenement has no right against the person who interferes with the light³. Any substantial interference with his comfortable use and enjoyment of his house according to the usages of ordinary persons in the locality is actionable as a nuisance at common law⁴. The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement, in addition to the right of property, before it can be enforced; the two latter are from the outset incidents to the right of property⁵. The wrong done is, however, in both cases the same, namely the disturbance of the owner in his enjoyment of his house⁶.

The mere interference with the light coming to the dominant tenement, or the mere fact that after the interference complained of the owner of the dominant tenement has not so much light as before, does not of itself constitute a nuisance⁷.

1 *Higgins v Betts* [1905] 2 Ch 210 at 214 per Farwell J.

2 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 212, HL.

3 *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; *Fishmongers' Co v East India Co* (1752) 1 Dick 163; *Higgins v Betts* [1905] 2 Ch 210 at 215 per Farwell J; *Davis v Marrable* [1913] 2 Ch 421 (alterations of buildings on servient tenement partly increasing and partly diminishing the light). As to the effect of the reservation of a right to develop notwithstanding that it will cause obstruction of or interference with the access of light see *Overcom Properties v Stockleigh Hall Residents Management Ltd* (1988) 58 P & CR 1, [1989] 14 EG 78; and in relation to development of after-acquired property see *Paragon Finance plc v City of London Real Property Co Ltd* [2002] 1 EGLR 97.

4 *Higgins v Betts* 2 Ch 210 at 214-215; *Fishmongers' Co v East India Co* (1752) 1 Dick 163; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 204, HL, per Lord Davey and at 210 per Lord Lindley; *Sheffield Masonic Hall Co Ltd v Sheffield Corp'n* [1932] 2 Ch 17 at 21; *Paul v Robson* (1914) 30 TLR 533, PC; *Frogmore Developments Ltd v Shirayama Shokusan Co* [2000] 1 EGLR 121.

5 *Higgins v Betts* [1905] 2 Ch 210.

6 *Higgins v Betts* [1905] 2 Ch 210 at 215; *Sheffield Masonic Hall Co Ltd v Sheffield Corp'n* [1932] 2 Ch 17; and see *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922.

7 See *Fishmongers' Co v East India Co* (1752) 1 Dick 163 at 165 per Lord Hardwicke LC; *Back v Stacey* (1826) 2 C & P 465 at 466 per Best CJ; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 186-187, HL; *Davis v Marrable* [1913] 2 Ch 421.

UPDATE

224 Interference must amount to a nuisance

NOTE 3--See also *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] JPL 1220.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/225. Extent of easement of light.

225. Extent of easement of light.

The easement of light does not consist in a right to have a continuance of all the light which has previously come to the windows of the dominant tenement¹. The test whether the interference complained of amounts to a nuisance is not whether the diminution is enough materially to lessen the amount of light previously enjoyed, nor is it entirely a question of how much light is left, without regard to what there was before, but whether the diminution, that is, the difference between the light before and the light after the obstruction, is such as really makes the building to a sensible degree less fit than it was before for the purposes of business or occupation according to the ordinary requirements of mankind². The amount of light sufficient according to the ordinary notions of mankind increases as standards increase³.

What the dominant owner is bound to show in order to maintain a claim is that the interference is such an obstruction of light as to interfere with the ordinary occupations of life⁴. In other words, the nature and extent of the right is to have that amount of light through the windows of the dominant house or building which is sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of the house as a dwelling house, if it is a dwelling house, or for the beneficial use and occupation of the building if it is a warehouse, shop or other place of business⁵. In the case of a greenhouse where the normal use requires a high degree of light this includes the right to that degree of light and the benefits of light including the rays of the sun required to grow plants in the greenhouse and not just the amount of light required for illumination⁶.

The rule that the easement of light does not give to the dominant owner a right to all the light coming to the windows of the dominant tenement applies whether the easement is based upon the doctrine of prescription at common law or is claimed under the provisions of the Prescription Act 1832⁷. A nuisance, however, is caused by the interference with the light coming to the dominant tenement if it results in a substantial privation of light sufficient to render the occupation of the house uncomfortable, or to prevent the owner from carrying on his accustomed business as beneficially as he formerly did⁸.

1 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 186, HL, per Lord Macnaghten; and see PARA 224 ante; *Fishmongers' Co v East India Co* (1752) 1 Dick 163; *Back v Stacey* (1826) 2 C & P 465; *Ankersen v Connelly* [1906] 2 Ch 544; affd on the facts [1907] 1 Ch 678, CA.

2 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 210, HL, per Lord Lindley: 'in applying the rule laid down in *Kelk v Pearson* (1871) 6 Ch App 809 it is impossible to avoid considering how much light is left and where it comes from. But the question to be decided is not how much light is left, but whether the plaintiff has been deprived of so much as to constitute an actionable nuisance'. See also *Colls v Home and Colonial Stores Ltd* supra at 198 per Lord Davey; *Kine v Jolly* [1905] 1 Ch 480 at 490, CA, per Vaughan Williams LJ (affd sub nom *Jolly v Kine* [1907] AC 1, HL); *Davis v Marrable* [1913] 2 Ch 421; *Paul v Robson* (1914) 30 TLR 533, PC; *Litchfield-Speer v Queen Anne's Gate Syndicate Ltd (No 2)* [1919] 1 Ch 407; *Charles Semon & Co v Bradford Corp* [1922] 2 Ch 737. Cf *Higgins v Betts* [1905] 2 Ch 210; *Parker v WF Stanley & Co Ltd* (1902) 50 WR 282; *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128, CA; *McGrath v Munster and Leinster Bank Ltd* [1959] IR 313; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922. A 'plaintiff' is now known as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 *Ough v King* [1967] 3 All ER 859, [1967] 1 WLR 1547, CA; *Deakins v Hookings* [1994] 1 EGLR 190, [1994] 14 EG 133, Mayor's and City of London Court.

4 *Clarke v Clark* (1865) 1 Ch App 16 at 20 per Lord Cranworth LC; see also *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213 at 228, CA, per Cotton LJ.

5 *Kelk v Pearson* (1871) 6 Ch App 809 at 811; see also *City of London Brewery Co v Tennant* (1873) 9 Ch App 212 at 218-219 per Lord Selborne LC; *Back v Stacey* (1826) 2 C & P 465 at 466, per Best CJ; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213 at 228, CA, per Cotton LJ; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 187, HL, per Lord Macnaghten, at 204 per Lord Davey and at 208 per Lord Lindley; *Ough v King* [1967] 3 All ER 859, [1967] 1 WLR 1547, CA; and see *Newham v Lawson* (1971) 115 Sol Jo 446 (church with stained-glass windows). The expressions 'the ordinary notions of mankind', 'comfortable use and enjoyment', and 'beneficial use and occupation', introduce elements of uncertainty, but similar uncertainty has always existed and exists still in all cases of nuisance: *Higgins v Betts* [1905] 2 Ch 210 at 214-216; *Price v Hilditch* [1930] 1 Ch 500. See also *Lyme Valley Squash Club Ltd v Newcastle under Lyme Borough Council* [1985] 2 All ER 405.

6 *Allen v Greenwood* [1980] Ch 119, [1979] 1 All ER 819, CA; the question whether, particularly in the case of solar heating, it would be possible to separate the heat or some other property of the sun from its light was left open.

7 *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; *Higgins v Betts* [1905] 2 Ch 210 at 215; *Newham v Lawson* (1971) 115 Sol Jo 446. For instances of the extreme but erroneous view that the dominant owner in prescription claims was entitled to the whole or substantially the whole light coming to the windows during the period of 20 years see *Calcraft v Thompson* (1867) 15 WR 387; *Scott v Pape* (1886) 31 ChD 554 at 571, CA; *Mackey v Scottish Windows' Fund Assurance Society* (1877) 11 Eq 541, CA; *Parker v Smith* (1832) 5 C & P 438 at 439; *Pringle v Wernham* (1836) 7 C & P 377 at 378; *Warren v Brown* [1902] 1 KB 15, CA. So far as the decisions in these cases were based upon this view the cases must be regarded as overruled. See generally *Colls v Home and Colonial Stores Ltd* supra at 189. As to prescription under the Prescription Act 1832 see generally para 99 et seq ante.

8 *Back v Stacey* (1826) 2 C & P 465; *Wells v Ody* (1836) 7 C & P 410 at 412 per Parke B; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213 at 223, CA, per Cotton LJ; *Parker v Smith* (1832) 5 C & P 438 at 439 per Tindal CJ. The court must take account both of the present use and of possible future uses of the building: *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/226. No fixed test as to amount of light.

226. No fixed test as to amount of light.

It is impossible to lay down any precise measure of the exact amount of light to which a dominant owner is entitled¹. The test is therefore uncertain, but its uncertainty may also be described as its elasticity². The general nature of the locality of the property can properly be taken into account in considering the standard of light rightfully required³.

It was formerly considered that if a building on the servient tenement, when completed, allowed light to come to the windows of the house forming the dominant tenement at an angle of 45 degrees from the perpendicular, no objection could be taken by the dominant owner to the diminution of light caused by that building. This was known as the '45 degrees rule'⁴. The fact, however, that 45 degrees of light are left is only a small element in the case. It may be used as a sort of test in the absence of any other mode of arriving at a conclusion, but there is no rule of law or of evidence and no presumption, except of the very slightest kind, that where the angular height of an erection is less than 45 degrees the access of light is not substantially interfered with⁵. Expert evidence by surveyors based on comparative photometric and other measurements for ascertaining actual or hypothetical obscuration is admissible, and, it has been said, of more assistance than the former so-called 45 degrees rule⁶. Another rule which it has been held is not to be applied rigidly but is merely a useful guide to be adopted or discarded according to the circumstances is the so-called 50-50 rule. According to this rule a room is adequately lit for ordinary purposes if at least half of the room enjoys at least one lumen of light at table level⁷. The question to be determined by the court cannot, however, always be fairly decided in accordance with technical calculations and the better test is to consider whether, as a matter of common sense, there is such a deprivation of light as to render the house or building less fit than it was before for the purposes of occupation or business in accordance with the ordinary ideas of mankind⁸.

1 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 200, HL, where Lord Davey said it is impossible to assert that any man has a right to a fixed 'amount of light ascertainable by metes and bounds'; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213 at 220, CA, per James LJ. See *Charles Semon & Co v Bradford Corp* [1922] 2 Ch 737.

2 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 185, HL, per Lord Halsbury LC.

3 *Ough v King* [1967] 3 All ER 859, [1967] 1 WLR 1547, CA, following *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128 at 137, 140, and at 142, CA, per Maugham LJ ('you must pay regard, as you must pay regard in the ordinary case of alleged nuisance owing to noise and vibration, to the locality in a wide sense'); not applying *Horton's Estate Ltd v James Beattie Ltd* [1927] 1 Ch 75.

4 See *Parker v First Avenue Hotel Co* (1883) 24 ChD 282 at 288-289, CA; *City of London Brewery Co v Tennant* (1873) 9 Ch App 212; *Theed v Debenham* (1876) 2 ChD 165.

5 *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213 at 220, CA, per James LJ; *City of London Brewery Co v Tennant* (1873) 9 Ch App 212 at 220; *Theed v Debenham* (1876) 2 ChD 165; *Hackett v Baiss* (1875) LR 20 Eq 494; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 210, HL, per Lord Lindley. See also *Charles Semon & Co v Bradford Corp* [1922] 2 Ch 737.

6 *Sheffield Masonic Hall Co Ltd v Sheffield Corp* [1932] 2 Ch 17 at 23-24; and see *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128, CA; *Ough v King* [1967] 3 All ER 859, [1967] 1 WLR 1547, CA; *Deakins v Hookings* [1994] 1 EGLR 190, [1994] 14 EG 133, Mayor's and City of London Court.

7 *Ough v King* [1967] 3 All ER 859 at 861-862, [1967] 1 WLR 1547 at 1552-1553, CA, per Lord Denning MR; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922. In *Deakins v Hookings*

[1994] 1 EGLR 190, [1994] 14 EG 133, Mayor's and City of London Court, citing *Ough v King* supra, this was said to be a bare minimum.

8 See the authorities cited in note 6 supra.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/227. Partial inconvenience.

227. Partial inconvenience.

In deciding the question whether or not a nuisance has been caused a distinction must be made between a partial inconvenience and a real injury to the dominant owner in the enjoyment of his premises¹. It depends upon all the surrounding circumstances, upon the amount of light coming from other sources, as well as upon the proximity of the obstructing buildings². Regard may be had not only to the present use to which the dominant house is put, but also to any ordinary uses for which it is adaptable³.

1 *Back v Stacey* (1826) 2 C & P 465 at 466 per Best CJ; *Kine v Jolly* [1905] 1 Ch 480 at 497, CA, per Romer LJ; affd sub nom *Jolly v Kine* [1907] AC 1, HL.

2 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 185, HL, per Lord Halsbury LC; *Ankersen v Connelly* [1906] 2 Ch 544; affd on the facts [1907] 1 Ch 678, CA. As to the necessity of taking into consideration the nature of the locality in cases of nuisance see generally *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642; *Sturges v Bridgman* (1879) 11 ChD 852 at 865, CA; *Polsue and Alfieri Ltd v Rushmer* [1907] AC 121, HL; but consider *Yates v Jack* (1866) 1 Ch App 295; *Dent v Auction Mart Co* (1866) LR 2 Eq 238; *Martin v Headon* (1866) LR 2 Eq 425; *Clarke v Clark* (1865) 1 Ch App 16; *Robson v Whittingham* (1866) 1 Ch App 442. Cf also para 226 the text and note 3 ante.

3 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 202, HL, per Lord Davey; cf the decisions as to possible future user in *Moore v Hall* (1878) 3 QBD 178; *Dicker v Popham, Radford & Co* (1890) 63 LT 379; and *Price v Hilditch* [1930] 1 Ch 500 (scullery windows); and see *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/228. Light from other sources.

228. Light from other sources.

The access of light from other sources cannot be regarded if and in so far as it is light upon the continuance of which the dominant owner cannot insist¹, for light to which a right has not been acquired by grant or prescription, and of which the dominant owner may be deprived at any time, ought not to be taken into account². Light which he can control, however, even though it reaches or reached him through a skylight in his roof and not across any neighbouring tenement, must be taken into account³.

1 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 211, HL; *Kine v Jolly* [1905] 1 Ch 480 at 498, CA (affd sub nom *Jolly v Kine* [1907] AC 1, HL); *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931] 2 Ch 402. As to the position where the light is enjoyed over two servient tenements see *Sheffield Masonic Hall Co Ltd v Sheffield Corp*n [1932] 2 Ch 17; *WH Bailey & Son Ltd v Holborn and Frascati Ltd* [1914] 1 Ch 598.

2 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 211, HL, per Lord Lindley. See also *Kine v Jolly* [1905] 1 Ch 480 at 498, CA, per Romer LJ (affd sub nom *Jolly v Kine* [1907] AC 1, HL); *Davis v Marrable* [1913] 2 Ch 421; *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931] 2 Ch 402.

3 *Smith v Evangelization Society (Incorporated) Trust* [1933] Ch 515, CA (skylights in roof of dominant tenement at outset of 20-year period, blocked up by dominant owner during that period, must be treated as reinstated).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/229. Increase and decrease of burden of easement.

229. Increase and decrease of burden of easement.

The use to which the dominant owner puts the light does not affect the question¹. He cannot increase the burden of the servitude either by altering the building on the dominant tenement², or by his user of the light³. He does not diminish the burden by the nature of his actual user, or even by complete non-user, or by not using the full measure of the light which the law permits⁴. If a person for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house to some purpose requiring an increased supply of light, he cannot suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations and thereby impose what is in substance an increased burden on his neighbour⁵. Conversely, if the owner of the dominant tenement builds on his own land in such a way as partially to interfere with the access of light to windows in respect of which he enjoys an easement of light, his doing so is no bar to a claim by him to prevent the servient owner from further interfering with the light⁶.

1 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 204, HL; *Price v Hilditch* [1930] 1 Ch 500.

2 *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931] 2 Ch 402. As to the result of alterations of buildings on a servient tenement partly increasing and partly diminishing the light see *Davis v Marrable* [1913] 2 Ch 421.

3 *Ambler v Gordon* [1905] 1 KB 417.

4 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 203, HL.

5 *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; see also *Ankerson v Connelly* [1907] 1 Ch 678, CA; *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931] 2 Ch 402; *Smith v Evangelization Society (Incorporated) Trust* [1933] Ch 515, CA.

6 *Baxter v Bower* (1875) 44 LJ Ch 625; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 202, HL, per Lord Davey.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/230. Extraordinary user.

230. Extraordinary user.

A right to an exceptional or extraordinary amount of light for a particular purpose can be acquired by prescriptive right¹ provided it was enjoyed for the full period of 20 years to the knowledge of the servient owner². It may be difficult to prove knowledge when the operation which requires special light is carried on indoors³.

1 *Allen v Greenwood* [1980] Ch 119, [1979] 1 All ER 819, CA. The earlier cases left the matter doubtful but tended to the contrary view: see *Lanfranchi v Mackenzie* (1867) LR 4 Eq 421 at 430; *Ambler v Gordon* [1905] 1 KB 417 at 423; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 203, HL; *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931] 2 Ch 402; *Sheffield Masonic Hall Co Ltd v Sheffield Corp* [1932] 2 Ch 17; *Smith v Evangelization Society (Incorporated) Trust* [1933] Ch 515, CA; cf however *Herz v Union Bank of London* (1854) 2 Giff 686; and see *Newham v Lawson* (1971) 115 Sol Jo 446 (church with stained glass).

2 *Allen v Greenwood* [1980] Ch 119, [1979] 1 All ER 819, CA; *Ambler v Gordon* [1905] 1 KB 417 at 423-424.

3 *Allen v Greenwood* [1980] Ch 119, [1979] 1 All ER 819, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(i) Nature of Right to Light/231. Right can only be claimed for buildings.

231. Right can only be claimed for buildings.

The easement of light can only be enjoyed in respect of buildings¹, and must be claimed in respect of a window or other aperture in a building on the dominant tenement². The use for 20 years of an open space in a particular way requiring light does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light³.

1 *Potts v Smith* (1868) LR 6 Eq 311; *Roberts v Macord* (1832) 1 Mood & R 230; see also *Scott v Pape* (1886) 31 ChD 554, CA; *Harris v De Pinna* (1886) 33 ChD 238, CA; *Collis v Laughher* [1894] 3 Ch 659; *Courtauld v Legh* (1869) LR 4 Exch 126; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA; *Clifford v Holt* [1899] 1 Ch 698; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 205, HL.

2 See PARA 240 post. See also *Sheffield Masonic Hall Co Ltd v Sheffield Corpn* [1932] 2 Ch 17 (skylights); *Smith v Evangelization Society (Incorporated) Trust* [1933] Ch 515, CA (skylights); *Levet v Gas Light and Coke Co* [1919] 1 Ch 24. As the right enures for the benefit of the dominant tenement, the present state of the buildings on that tenement does not necessarily diminish the measure of damages caused by the unlawful obstruction. See *Griffith v Richard Clay & Sons Ltd* [1912] 2 Ch 291, CA; *Wills v May* [1923] 1 Ch 317.

3 *Roberts v Macord* (1832) 1 Mood & R 230.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/232. Acquisition of right to light by express grant.

(ii) Acquisition of Right to Light

232. Acquisition of right to light by express grant.

A right to light may be created by express grant¹. The grant may be in the form of a covenant², or may be effected by the use of general words whereby what were formerly merely quasi-easements are converted into valid easements³. Like other easements an equitable right to light can be created by an agreement for valuable consideration provided it is made in writing to comply with the requirements of the Law of Property (Miscellaneous Provisions) Act 1989⁴. Where the requirements of the Act have not been complied with but the grantee has acted on the agreement to his detriment it may be possible in some circumstances to rely on the doctrine of proprietary estoppel⁵.

1 *Dalton v Angus*(1881) 6 App Cas 740, at 794, HL; *Higgins v Betts*[1905] 2 Ch 210 at 214; *Booth v Alcock*(1873) 8 Ch App 663 at 667. The right may also arise by virtue of the Leasehold Reform Act 1967 s 10(2): see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1453.

2 As to whether the easement of light and other negative easements are properly the subject of grant or are only capable of being created by covenant see *Moore v Rawson* (1824) 3 B & C 332 at 340; *Rowbotham v Wilson* (1857) 8 E & B 123 at 147, Ex Ch (affd (1880) 8 HL Cas 348); *Hall v Lichfield Brewery Co* (1880) 49 LJ Ch 655 at 656; *Leech v Schweder*(1874) 9 Ch App 463 at 474; *Dalton v Angus*(1881) 6 App Cas 740 at 794-795, 823, HL. Cf also *Lady Prinsep v Belgravian Estate Ltd* [1896] WN 39, CA; and see PARA 18 ante.

3 See PARA 57 ante.

4 Ie the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARAS 52, 127 ante. The doctrine of part performance has been abolished by that Act and can no longer be relied on: see PARA 52 note 4 ante.

5 See PARA 39 ante; and ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/233. Acquisition of right to light by implied grant.

233. Acquisition of right to light by implied grant.

The right to light may be created by implication of law¹. If a person owns a house, and also owns property of any kind adjoining that house, and then either conveys the house in fee simple or demises it for a term of years to another person, a right to light, unobstructed by anything to be erected on any land which at the time of the grant belonged to the grantor, passes to the grantee². It makes no difference whether the windows of the house are ancient lights or not³. This principle holds good with regard to dispositions by will as well as to dispositions inter vivos and for valuable consideration⁴, and applies in the case of a mortgagee selling under his statutory power of sale⁵.

The extent, in point of duration, of the easement of light thus arising by implication of law is necessarily limited to the duration of the estate or interest which the common owner had in the servient tenement at the time when the easement arose⁶. This is so even though he may subsequently acquire an extended interest in that tenement⁷.

A contract to sell land with a building deriving light over the land of another owner does not operate as a warranty that the light is rightfully enjoyed⁸.

1 *Palmer v Fletcher* (1663) 1 Lev 122; *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 ChD 295, CA; *Bailey v Icke* (1891) 64 LT 789; *Robinson v Grave* (1873) 29 LT 7; *Corbett v Jonas* [1892] 3 Ch 137; *Phillips v Low* [1892] 1 Ch 47; *Rigby v Bennett* (1882) 21 ChD 559 at 567, CA; *Pollard v Gare* [1901] 1 Ch 834; *Godwin v Schweppes Ltd* [1902] 1 Ch 926; *Financial Times Ltd v Bell* (1903) 19 TLR 433. As to the creation of easements by implication of law see PARA 63 et seq ante. A contract for the sale of a house with windows overlooking the land of a third person does not imply any representation or warranty that the windows are entitled to the access of light over that land: *Greenhalgh v Brindley* [1901] 2 Ch 324.

2 *Leech v Schweder* (1874) 9 Ch App 463 at 472; *Palmer v Fletcher* (1663) 1 Lev 122; *Robinson v Grave* (1873) 29 LT 7; *Coutts v Gorham* (1829) Mood & M 396; *Born v Turner* [1900] 2 Ch 211; *Davies v Marshall* (1861) 1 Drew & Sm 557; *Salaman v Glover* (1875) LR 20 Eq 444; *Pollard v Gare* [1901] 1 Ch 834. See also *Quicke v Chapman* [1903] 1 Ch 659 at 670-671, CA, per Romer LJ; *Browne v Flower* [1911] 1 Ch 219 at 225 per Parker J.

3 *Leech v Schweder* (1874) 9 Ch App 463; *Palmer v Fletcher* (1663) 1 Lev 122; *Coutts v Gorham* (1829) Mood & M 396.

4 *Phillips v Low* [1892] 1 Ch 47; *Barnes v Loach* (1879) 4 QBD 494, DC.

5 *Born v Turner* [1900] 2 Ch 211.

6 *Booth v Alcock* (1873) 8 Ch App 663; *Godwin v Schweppes Ltd* [1902] 1 Ch 926.

7 *Booth v Alcock* (1873) 8 Ch App 663; *Godwin v Schweppes Ltd* [1902] 1 Ch 926; cf *Rymer v McIlroy* [1897] 1 Ch 528.

8 *Smith v Colbourne* [1914] 2 Ch 533, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/234. No implied reservation of light.

234. No implied reservation of light.

Where a person owns a house and adjoining land or two adjoining houses, and disposes of the land or one of the houses, retaining a house, no easement of light arises by implication in his favour¹ except perhaps in the case of great necessity².

¹ *Wheeldon v Burrows* (1879) 12 ChD 31, CA; *White v Bass* (1862) 7 H & N 722; *Curriers' Co v Corbett* (1865) 2 Drew & Sm 355 at 360; *Ellis v Manchester Carriage Co* (1876) 2 CPD 13. Cf *Russell v Watts* (1885) 10 App Cas 590, HL; *Canham v Fisk* (1831) 2 Cr & J 126 at 128; *Master v Hansard* (1876) 4 ChD 718, CA.

² *Ray v Hazeldine* [1904] 2 Ch 17. See PARAS 64-66 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/235. Simultaneous grants.

235. Simultaneous grants.

If the owner has two adjoining tenements and simultaneously disposes of both to different grantees, an easement of light is created by implication of law in favour of the grantee of each tenement against the grantee of the other¹.

¹ *Allen v Taylor* (1880) 16 ChD 355; *Rigby v Bennett* (1882) 21 ChD 559 at 567, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/236. Claim to right to light by prescription.

236. Claim to right to light by prescription.

The right to light may be claimed under the doctrine of prescription or, except against the Crown¹, under the provisions of the Prescription Act 1832². Although for some time after the passing of that Act it was believed that the method of claiming the easement rested thenceforth solely upon its provisions³, in fact the Act in no way altered the pre-existing law⁴. There is no difference with regard to the nature and extent of the easement of light, whether the right to it is claimed under the doctrine of prescription at common law, or under the doctrine of a lost modern grant, or under the provisions of the Prescription Act 1832⁵. The Act has only altered the conditions or length of user by which the right may be acquired⁶, and neither enlarges the right of the dominant tenement nor adds to the burden of the servient tenement⁷.

¹ See PARA 247 post.

² See the Prescription Act 1832 s 3 (as amended); and PARA 237 post.

³ See *Tapling v Jones* (1865) 11 HL Cas 290 at 310 per Lord Cranworth; *Truscott v Merchant Tailors' Co* (1856) 11 Exch 855 at 863, Ex Ch.

⁴ *Kelk v Pearson* (1871) 6 Ch App 809 at 811 per James LJ; *Aynsley v Glover* (1875) 10 Ch App 283; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 198, HL; see also *Duke of Norfolk v Arbuthnot* (1879) 4 CPD 290 (affd (1880) 5 CPD 390, CA); *Sheffield Masonic Hall Co Ltd v Sheffield Corpn* [1932] 2 Ch 17 at 21 per Mayhem J.

⁵ *Kelk v Pearson* (1871) 6 Ch App 809; see also *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 198-199, HL, per Lord Davey, and at 190 per Lord Macnaghten; *Leech v Schweder* (1874) 9 Ch App 463; *Aynsley v Glover* (1875) 10 Ch App 283; *Scott v Pape* (1886) 31 ChD 554, CA. As to the creation of easements under the doctrine of prescription see PARA 74 et seq ante. In respect of an easement of light it is in the nature of the case usually easy to repel a claim by prescription at common law by evidence displacing the presumption of immemoriality. For an elaborate review of the authorities as to whether a right to an easement of light can effectively be claimed after the enactment of the Prescription Act 1832 by prescription based on lost modern grant see *Tisdall v McArthur & Co (Steel and Metal) Ltd* [1951] IR 228 at 235-243, where the Irish Court of Appeal left the point open. It is submitted that a lost grant upwards of 20 years old may be relied upon as a prescriptionary basis for light, on principle and on authority; and whether before or after the enactment of the Prescription Act 1832.

⁶ *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 199, HL, per Lord Davey.

⁷ *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 190, HL, per Lord Macnaghten. As to prescription under the Prescription Act 1832 see generally para 99 et seq ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/237. Enjoyment under the Prescription Act 1832.

237. Enjoyment under the Prescription Act 1832.

When the access and use of light to any dwelling house, workshop or other building has been actually enjoyed, without interruption, for the full period of 20 years the right to it is deemed by virtue of the Prescription Act 1832 to be absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing¹.

The Act has materially altered the nature of the enjoyment by which the right may be acquired; for enjoyment as of right is not necessary in order that a person may establish a prescriptive claim under the Act to the easement of light².

The statute has thus created a fresh origin for the right, differing in a most material manner from prescription at common law or under the doctrine of a lost modern grant, for the prescription of the Act is not based upon the supposition of any implied grant or covenant. If the requirements of the statute as to enjoyment for a certain period are fulfilled, any such supposition is unnecessary³.

1 Prescription Act 1832 s 3 (amended by the Statute Law Revision (No 2) Act 1888). See also PARA 241 post; and see *Mallam v Rose* [1915] 2 Ch 222 (verbal demise). As to the custom of London relating to light see *Wynstanley v Lee* (1818) 2 Swan 333; *Perry v Eames* [1891] 1 Ch 658. Enjoyment under the Prescription Act 1832 defeats the custom: *Salters' Co v Jay* (1842) 3 QB 109; *Truscott v Merchant Tailors' Co* (1856) 11 Exch 855, Ex Ch. It is within the power of the owner of a building which has enjoyed a right to light for more than 20 years to agree with the person to whom he grants an interest in that building that he should not be entitled to assert such a right: *Paragon Finance Ltd v City of London Real Property Ltd* [2001] All ER (D) 205 (Jul).

2 *Truscott v Merchant Tailors' Co* (1856) 11 Exch 855, Ex Ch; *Frewen v Philipps* (1861) 11 CBNS 449, Ex Ch; *Simper v Foley* (1862) 2 John & H 555; *Harbidge v Warwick* (1849) 3 Exch 552; *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; *Kilgour v Gaddes* [1904] 1 KB 457 at 462, CA; *Gardner v Hodgson's Kingston Brewery Co* [1901] 2 Ch 198 at 215, CA; affd [1903] AC 229, HL; *Mallam v Rose* [1915] 2 Ch 222. As to the meaning of 'enjoyment' or 'user as of right' see PARA 85 ante. As to the statutory meaning of 'interruption' see PARA 243 post.

3 *Scott v Pape* (1886) 31 ChD 554 at 571, CA, per Bowen LJ; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 205, HL; *Truscott v Merchant Tailors' Co* (1865) 11 Exch 855, Ex Ch; *Frewen v Philipps* (1861) 11 CBNS 449; *Simper v Foley* (1862) 2 John & H 555; *Harbidge v Warwick* (1849) 3 Exch 552; *Morgan v Fear* [1907] AC 425, HL.

UPDATE

237 Enjoyment under the Prescription Act 1832

NOTE 1--See *Salvage Wharf Ltd v G & S Brough Ltd* [2009] EWCA Civ 21, [2009] 3 WLR 990, [2009] All ER (D) 241 (Jan) (clause did not come within scope of 1832 Act s 3).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/238. Light must be acquired in respect of a building.

238. Light must be acquired in respect of a building.

An easement of light can only be acquired under the Prescription Act 1832 in respect of a building¹, not any particular room in it², and cannot be acquired in respect of open land, such as a garden³. The building in respect of which the claim is made must be some structure of the same nature as a dwelling house or workshop⁴. Every structure which is a 'building' within the meaning of the London Building Acts⁵ is not necessarily a building with respect to which a prescriptive claim to light can be successfully made under the Prescription Act 1832⁶. Claims to light have been successfully made under the Act in respect of a church⁷, an unconsecrated chapel⁸, a greenhouse⁹, a picture gallery¹⁰, a factory¹¹, a cottage¹², a glass photographic studio¹³, a hotel¹⁴ and a cowshed¹⁵; but have failed in the case of a sawpit or timber yard¹⁶.

A right to light may be acquired under the Act in respect of a house which has not been inhabited, or even fit for habitation¹⁷, during the whole or part of the statutory period¹⁸.

1 *Scott v Pape* (1886) 31 ChD 554, CA; *Harris v De Pinna* (1886) 33 ChD 238, CA; *Collis v Laughler* [1894] 3 Ch 659; *Courtauld v Legh* (1869) LR 4 Exch 126; *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA; *Clifford v Holt* [1899] 1 Ch 698; *Potts v Smith* (1868) LR 6 Eq 311; *A-G v Queen Anne Garden and Mansions Co* (1889) 60 LT 759; *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; and see PARA 240 post.

2 *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922.

3 *Potts v Smith* (1868) LR 6 Eq 311.

4 *Harris v De Pinna* (1886) 33 ChD 238, CA.

5 See BUILDING vol 4(2) (2002 Reissue) PARA 302.

6 *Harris v De Pinna* (1886) 33 ChD 238, CA. As to prescription under the Prescription Act 1832 see generally para 99 et seq ante.

7 *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA; *Anderson v Francis* [1906] WN 160; *Newham v Lawson* (1971) 115 Sol Jo 446, where the degree of protection in respect of stained glass windows was considered. As to whether there is a right to light coming through an arch of the chancel of a church see *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390 at 392, CA; and see *Myers v Catterson* (1889) 43 ChD 470, CA. As to light coming through a glass roof on the servient tenement see *Tisdall v McArthur & Co (Steel and Metal) Ltd* [1951] IR 228. There is no reason why light passing through clear glass, though refracted, cannot be the subject of an easement: *Tisdall v McArthur & Co (Steel and Metal) Ltd* supra at 247.

8 *A-G v Queen Anne Garden and Mansions Co* (1889) 60 LT 759.

9 *Clifford v Holt* [1899] 1 Ch 698. See also *Allen v Greenwood* [1980] Ch 119, [1979] 1 All ER 819, CA (amount of light to which greenhouse is entitled is high degree of light required for its normal use).

10 *A-G v Queen Anne Garden and Mansions Co* (1889) 60 LT 759 at 760; see also *Clifford v Holt* [1899] 1 Ch 698.

11 See eg *Warren v Brown* [1902] 1 KB 15, CA.

12 *Cowper v Laidler* [1903] 2 Ch 337.

13 *Lazarus v Artistic Photographic Co* [1897] 2 Ch 214; see also *Clifford v Holt* [1899] 1 Ch 698 at 702.

14 *Martin v Price* [1894] 1 Ch 276, CA.

15 *Hyman v Van den Bergh* [1908] 1 Ch 167, CA, where, however, the claim failed because the light had been enjoyed by consent during part of the statutory period.

16 *Roberts v Macord* (1832) 1 Mood & R 230.

17 *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL; *Collis v Laughher* [1894] 3 Ch 659; *Courtauld v Legh* (1869) LR 4 Exch 126.

18 *Collis v Laughher* [1894] 3 Ch 659 at 661 per Romer J, where it was held that time ran under the statute in favour of the owner of a house from a time when all external work was done, the walls finished, the windows placed in position, the joists in place for the different landings and the roof put on and completely tiled, although neither the glass nor sashes of the windows had been put in, nor the joists laid on the floors, nor pipes for gas and water installed.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/239. Access of light without user.

239. Access of light without user.

Before an easement of light can be acquired under the Prescription Act 1832 there must be both access and use of light, for access alone, that is to say free passage of light over the servient tenement, is not sufficient¹. Thus no right of light can be acquired in respect of windows barred by shutters which cannot be opened, or which are never in fact opened during the 20 years². 'Access'³ does not refer to access through the aperture or window of the dominant tenement, but to the freedom of passage of light over the servient tenement⁴. The right acquired under the Act is governed and measured to a great extent by the access of light to the dominant tenement, and the aperture which lets the light into that tenement is a material element in defining the area which must be kept free over the servient tenement⁵. The size and situation of the aperture is not the exclusive test of the maximum and minimum measures of the right acquired, however, without reference to the use and enjoyment of the light to which it has given access⁶.

1 *Scott v Pape* (1886) 31 ChD 554 at 575, CA; *Cooper v Straker* (1888) 40 ChD 21 at 26; *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 205, HL.

2 *Courtauld v Legh* (1869) LR 4 Exch 126, as explained in *Smith v Baxter* [1900] 2 Ch 138 at 145.

3 *Id.* as used in the Prescription Act 1832 s 3 (as amended): see PARA 237 ante.

4 *Scott v Pape* (1886) 31 ChD 554, CA. See also *Harris v De Pinna* (1886) 33 ChD 238, CA; *Colls v Home and Colonial Stores Ltd* [1904] AC 179, HL.

5 *Scott v Pape* (1886) 31 ChD 554, CA; and see *Andrews v Waite* [1907] 2 Ch 500.

6 *Colls v Home and Colonial Stores Ltd* [1904] AC 179 at 206, HL; *Kelk v Pearson* (1871) 6 Ch App 809; *City of London Brewery Co v Tennant* (1873) 9 Ch App 212; *Leech v Schweder* (1874) 9 Ch App 463; cf *Tapling v Jones* (1865) 11 HL Cas 290 at 305-306; *Yates v Jack* (1866) 1 Ch App 295; *Calcraft v Thompson* (1867) 15 WR 387.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/240. Nature of apertures.

240. Nature of apertures.

The apertures through which the light may enter the dominant tenement are not confined to ordinary windows, but may consist of skylights¹, unglazed windows in which there are not even sashes², the windows³ and, probably, the arch of a church⁴, a glazed door⁵, the glass sides of a photographic studio⁶, the roof and sides of a greenhouse or conservatory, whether or not it is attached to a dwelling house⁷ or the roof and sides of a vinery⁸. An ordinary doorway primarily constructed for the purpose of being closed, however, is not such an aperture as the apertures to which the Prescription Act 1832 applies⁹.

1 *Smith v Baxter* [1900] 2 Ch 138; *Easton v Isted* [1903] 1 Ch 405, CA; *Harris v Kinloch & Co* [1895] WN 60; *Presland v Bingham* (1889) 41 ChD 268, CA; *Cowper v Laidler* [1903] 2 Ch 337.

2 *Collis v Laughler* [1894] 3 Ch 659.

3 *Ecclesiastical Comrs for England v Kino* (1880) 14 ChD 213, CA; *Newham v Lawson* (1971) 115 Sol Jo 446.

4 *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390, CA.

5 *Presland v Bingham* (1889) 41 ChD 268, CA.

6 *Lazarus v Artistic Photographic Co* [1897] 2 Ch 214. Cf *Harris v De Pinna* (1886) 33 ChD 238 at 262, CA, where a prescriptive claim to light under the Prescription Act 1832 to a timber shed consisting of a roof and framework failed upon other grounds.

7 *Clifford v Holt* [1899] 1 Ch 698; *Allen v Greenwood* [1980] Ch 119, [1979] 1 All ER 819, CA.

8 *Born v Turner* [1900] 2 Ch 211.

9 *Levet v Gas Light and Coke Co* [1919] 1 Ch 24.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/241. Enjoyment under agreement.

241. Enjoyment under agreement.

No right to light can be successfully claimed under the Prescription Act 1832 where it is shown that the alleged right has been enjoyed under some consent or agreement expressly given for that purpose by deed or writing¹. A writing signed by the owner of the dominant tenement and not by the owner of the servient tenement may be sufficient evidence of agreement for this purpose², though perhaps not of a mere consent by the servient owner. The object of requiring 'agreement' in writing was not to allow the matter to depend upon parol evidence³.

The payment of rent by the owner or occupier of the dominant tenement for the use of light, although not such an interruption as will prevent the easement of light being successfully claimed under the Prescription Act 1832 after the statutory period has elapsed⁴, will yet preclude any successful claim to the light if the payment is made under a written consent or agreement by virtue of which the enjoyment of the light is allowed⁵.

An express reservation to the lessor of the right to build on his adjoining land will prevent the lessee from gaining a title to light and air by prescription⁶.

1 Prescription Act 1832 s 3; *Haynes v King* [1893] 3 Ch 439; *Bewley v Atkinson* (1879) 13 ChD 283, CA; *Hyman v Van den Bergh* [1908] 1 Ch 167, CA; *Foster v Lyons & Co Ltd* [1927] 1 Ch 219 (reservation in lease of right to build on adjoining property); *Willoughby v Eckstein (No 2)* [1937] Ch 167, [1937] 1 All ER 257 (converse case of express exception out of a demise of enjoyment by lessee of any right to light). Cf *Mitchell v Cantrill* (1887) 37 ChD 56, CA; *Hapgood v JH Martin & Son* (1934) 152 LT 72; *Easton v Isted* [1903] 1 Ch 405, CA. See also *Ruscoe v Grounsell* (1903) 89 LT 426, CA, where an inscription on a stone built into a wall was held not to be a consent in writing; *Mallam v Rose* [1915] 2 Ch 222.

2 *Bewley v Atkinson* (1879) 13 ChD 283, CA; *Mitchell v Cantrill* (1887) 37 ChD 56 at 61, CA.

3 *Bewley v Atkinson* (1879) 13 ChD 283 at 292, 294, 299, CA. Cf the Statute of Frauds (1677) (largely repealed).

4 *Plasterers' Co v Parish Clerks' Co* (1851) 6 Exch 630, where the rent was paid under a verbal agreement.

5 Ie under the Prescription Act 1832 s 3.

6 *Haynes v King* [1893] 3 Ch 439. It is not sufficient for the lessor merely to except rights, if any, restricting the free use of his adjoining land: *Mitchell v Cantrill* (1887) 37 ChD 56, CA. As to the meaning of 'adjoining' see *Haynes v King* supra; *Re Baroness Bateman and Parker's Contract* [1899] 1 Ch 599; *Ind Coope & Co v Hamblin* (1900) 48 WR 238; *White v Harrow, Harrow v Marylebone District Property Co Ltd* (1902) 50 WR 259, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/242. Agreement with occupier of dominant tenement.

242. Agreement with occupier of dominant tenement.

The occupier actually enjoying the access of light or the use of the dominant tenement is the only person whose consent or agreement in writing can be effectual to prevent the acquisition of light. Mere casual occupants, such as visitors, guests, lodgers or employees, residing in the house, or a caretaker of an empty house or employees at a workshop, cannot effectually agree or consent, for their occupation and enjoyment is by leave and licence of the master of the house or workshop and is in truth his occupation and enjoyment. The occupier need not be the owner in fee simple. The acts or acquiescence of an adverse possessor during his occupation of the premises are equally effectual for the purpose of acquiring, defeating or abandoning the right to light¹.

1 *Hyman v Van den Bergh* [1908] 1 Ch 167 at 179, CA, per Farwell LJ.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/243. Statutory interruption.

243. Statutory interruption.

No easement of light can be acquired under the Prescription Act 1832 where there has been a statutory interruption in the enjoyment of the light¹. 'Interruption'² refers to an adverse obstruction and not to a mere discontinuance of user³. The question whether there has or has not been an effective interruption cannot be determined by simply considering whether an obstacle interposed to the enjoyment of the easement is fixed or movable, for although fixedness or movability of the obstacle are important elements to be taken into consideration the decision of each case depends upon all the circumstances which are brought before the court⁴. If it appears on the evidence of the person seeking to establish the easement that there has been an interruption which, from its nature, is likely to be of a permanent character, then it lies upon him to show that it did not in fact last for a year; but if it appears that the interruption is not one likely to be of a permanent character, or from its nature is not of a permanent character, it lies upon the party opposing the claim to show that there has been an interruption which has been existing and acquiesced in for more than a year⁵.

The access of light may be notionally obstructed by the registration under the Rights of Light Act 1959 of a notice as a local land charge⁶.

1 Prescription Act 1832 ss 3, 4 (amended by the Statute Law Revision (No 2) Act 1888); *Presland v Bingham* (1889) 41 ChD 268, CA. As to what amounts to a statutory interruption see PARA 109 ante.

2 'Interruption' bears the same meaning in the Prescription Act 1832 s 3 (as amended) as it bears in s 4 (as amended): *Smith v Baxter* [1900] 2 Ch 138 at 143 per Stirling J; *Tisdall v McArthur & Co (Steel and Metal) Ltd* [1951] 1 IR 228 at 247, where the erection of a glass roof over a yard in the servient tenement upwards of 20 years previously was held not to be an interruption for the purposes of the Prescription Act 1832 s 3 (as amended) of the remaining light passing through it, even though it was refracted by it.

3 *Smith v Baxter* [1900] 2 Ch 138; *Plasterers' Co v Parish Clerks' Co* (1851) 6 Exch 630 at 635 per Lord Campbell CJ; *Carr v Foster* (1842) 3 QB 581 (a decision under the Prescription Act 1832 s 1 (as amended) (see PARA 111 ante)).

4 *Smith v Baxter* [1900] 2 Ch 138.

5 *Presland v Bingham* (1889) 41 ChD 268 at 274, CA, per Cotton LJ, where it was held that there was no interruption of light effected by piles of packing cases containing marble and stone which were removed from time to time as required and replaced by others; *Dance v Triplow* [1992] 1 EGLR 190, CA.

6 See PARAS 244-245 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/244. Registration of light obstruction notice.

244. Registration of light obstruction notice.

For the purpose of preventing the access and use of light from being taken to be enjoyed without interruption, any person who is an owner¹ of land (the 'servient land') over which light passes to a dwelling-house, workshop or other building ('the dominant building') may apply to the local authority² in whose area the dominant building is situated for the registration of a notice³.

The application must be in the prescribed form⁴, identifying the servient land and the dominant building in the prescribed manner and stating that registration is intended to be equivalent to the obstruction of access of light to the dominant building across the servient land which would be caused by the erection, in the position on the servient land specified in the application, of an opaque structure of the dimensions specified, including, if so stated, unlimited height⁵. It must be accompanied by a certificate issued by the Lands Tribunal⁶ either certifying that adequate notice has been given to all persons who appear likely to be affected by the registration⁷ or certifying that the case is one of exceptional urgency and that accordingly a notice should be registered forthwith as a temporary notice for the period specified in the certificate⁸.

Where application is duly made to a local authority for the registration of a notice under these provisions, it is the duty of that authority to register the notice in the appropriate local land charges register⁹.

The person on whose application the notice was registered, or any owner of the servient land or part of it who is a successor in title to that person, may within a year from the date of registration apply in the prescribed form¹⁰ for:

- 61 (1) amendment of the registered particulars of the position or dimensions of the structure to which registration is intended to be equivalent, so as to reduce its height or length or to increase its distance from the dominant building; or
- 62 (2) cancellation of the registration;

and on receiving any such application the registering authority must file it and amend or cancel the registration accordingly¹¹.

Any challenge to the decision of the Lands Tribunal to issue a certificate, or to the registration of a notice by the local authority, must be by means of judicial review¹².

1 'Owner' means a person who is the estate owner in respect of the fee simple or is entitled to a tenancy (within the meaning of the Landlord and Tenant Act 1954) for a term of years certain of which at least seven years remain unexpired, or is a mortgagee in possession (within the meaning of the Law of Property Act 1925), where the interest mortgaged is either the fee simple or such a tenancy: Rights of Light Act 1959 s 7(1).

2 For these purposes, 'local authority', in relation to land in a district or a London borough, means the council of the district or borough, and, in relation to land in the City of London, means the Common Council of the City: *ibid* s 7(1) (definition substituted by the Local Land Charges Act 1975 s 17(2), Sch 1).

3 Rights of Light Act 1959 s 2(1).

4 An application under *ibid* s 2(2) for registration of a light obstruction notice must be in the form set out in the Local Land Charges Rules 1977, SI 1977/985, r 2(3), Sch 1 Form A and must be accompanied by the certificate of the Lands Tribunal relating to the notice (see the text and notes 6-8 *infra*): r 10(1).

5 Rights of Light Act 1959 s 2(2).

6 Provision must be made by rules under the Lands Tribunal Act 1949 s 3 (as amended) (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 721-723) for regulating proceedings before the Lands Tribunal with respect to the issue of certificates for these purposes, and, subject to the approval of the Treasury, the fees chargeable in respect of those proceedings; and, without prejudice to the generality of s 3(6) (as amended), any such rules made for these purposes must include provision (1) for requiring applicants for certificates under the Rights of Light Act 1959 s 2(3)(a) (see the text and note 7 *infra*) to give such notices, whether by way of advertisement or otherwise, and to produce such documents and provide such information, as may be determined by or under the rules; (2) for determining the period to be specified in a certificate issued under s 2(3)(b) (see the text and note 8 *infra*); and (3) in connection with any certificate issued under s 2(3)(b)(b), for enabling a further certificate to be issued in accordance, subject to the necessary modifications, with s 2(3)(a): s 2(5). For the rules so made see the Lands Tribunal Rules 1996, SI 1996/1022, Pt VI (rr 21-24); and see notes 7-8 *infra*.

For the prescribed form of application for such a certificate see rr 1(2), 21(1), Sch 1 Form 1. An application for such a certificate must be accompanied by two copies of the application which the applicant proposes to make to the local authority in whose area the dominant building is situated: r 21(2). Upon receipt of an application the registrar must determine what notices are to be given, whether by advertisement or otherwise, to persons who appear to have an interest in the dominant building referred to in r 21(2); and for this purpose the registrar must require the applicant to provide any documents or information which it is within his power to provide: r 22(1), (2). The notices that the registrar determines are to be given under r 22 must be given by the applicant who must notify the registrar in writing once this has been done setting out full particulars of the steps he has taken: r 22(3). The Tribunal must issue a certificate in the form set out in Sch 1, Form 3 or, where a temporary certificate has been issued under r 23 (see note 8 *infra*), in Sch 1, Form 4, once it is satisfied that the notices which the registrar has determined are to be given under r 22 have been duly given: r 24.

7 Rights of Light Act 1959 s 2(3)(a).

8 *Ibid* s 2(3)(b). Where the Tribunal is satisfied that exceptional urgency requires the immediate registration of a temporary notice in the register of local land charges, it must issue a temporary certificate in the form set out in the Lands Tribunal Rules 1996, SI 1996/1022, Sch 1, Form 2: r 23(1). A temporary certificate may not last longer than six months: r 23(2). Where, after a temporary certificate has been filed and before the period for which it operates has expired a definitive certificate is lodged with the registering authority, it must file the definitive certificate with the application and amend the registration accordingly: Local Land Charges Rules 1977, SI 1977/985, r 10(3).

9 Rights of Light Act 1959 s 2(4) (amended by the Local Land Charges Act 1975 s 17(2), Sch 1). On receiving the application and the certificate the registering authority must file them and register the notice in accordance with the Local Land Charges Rules 1977, SI 1977/985, r 6: r 10(2). Any notice so registered is a local land charge but the Local Land Charges Act 1975 ss 5(1), (2), 10 (as amended) do not apply in relation thereto: Rights of Light Act 1959 s 2(4) (as so amended). See further LAND CHARGES vol 26 (2004 Reissue) PARA 686.

10 For the prescribed form see the Local Land Charges Rules 1977, SI 1977/985, r 2(3), Sch 1 Form B.

11 *Ibid* r 10(5).

12 *Bowring Services Ltd v Scottish Widows Fund and Life Assurance Society* [1995] 1 EGLR 158, [1995] 16 EG 206, applying *O'Reilly v Mackman* [1983] 2 AC 237, [1982] 3 All ER 1124, HL.

UPDATE

244 Registration of light obstruction notice

TEXT AND NOTES--References to the Lands Tribunal are now to the Upper Tribunal: Rights of Light Act 1959 s 2(3), SI 1977/985 r 10(1), SI 1996/1022 Sch 1 Forms 1-4 (amended by SI 2009/1307).

NOTE 6--For words 'provision must be made ... before the Lands Tribunal' read 'provision may be made by Tribunal Procedure Rules': Rights of Light Act 1959 s 2(5) (amended by SI 2009/1307). SI 1996/1022 r 21(1) amended: SI 2009/1307.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/245. Effect of registration of light obstruction notice.

245. Effect of registration of light obstruction notice.

Where a light obstruction notice is registered then, for the purpose of determining whether any person is entitled, by virtue of the Prescription Act 1832 or otherwise, to a right to the access of light to the dominant building across the servient land, the access of light is treated as obstructed to the same extent and with the like consequences as if an opaque structure of the specified dimensions had on registration been erected by the applicant in the specified position and had remained there until expiry of the notice and had then been removed¹. The events on any one of which a notice expires are cancellation of the registration, expiry of one year from registration and, where the application was accompanied by a certificate of exceptional urgency², expiry of the period specified in it without a further certificate having been lodged³. The registering authority⁴ must cancel⁵ the registration of a notice:

- 63 (1) where in relation to the notice a temporary certificate⁶ has been filed and no definitive certificate⁷ has been filed, on the expiration of the period of operation specified in the temporary certificate;
- 64 (2) in any other case, on the expiration of 21 years from the date of registration;

and thereupon any document relating to the notice and filed⁸ must be taken off the file⁹.

Any person who, if such a structure had been so erected, would have had a right of action in respect of it in any court on the grounds of infringement of his right to the access of light to the dominant building across the servient land has the like right of action in that court in respect of registration of a notice¹⁰. A claim¹¹ may not, however, be begun after the expiry of the notice¹². Where at any time during the currency of the notice the circumstances are such that, if access of light had been enjoyed continuously from a date one year earlier than the date on which enjoyment in fact began, a person would have had a right of action in any court in respect of registration, he has the like right of action in that court in respect of it¹³.

The remedies available in a claim brought by virtue of the above provisions are such declaration as the court may consider appropriate, and an order directing the registration to be cancelled or varied, as the court may determine¹⁴.

For the purposes of the requirement of the Prescription Act 1832¹⁵ that enjoyment is not to be treated as interrupted except by a matter submitted to or acquiesced in for one year after notice, all persons interested in the dominant building or any part of it are deemed, as from the date of registration, to have notice of registration and of the person on whose application it took place¹⁶. Until a claim is brought¹⁷ in respect of it all such persons are deemed to acquiesce in the obstruction treated as resulting from registration¹⁸ and as from the date on which such a claim is brought no person is to be treated as submitting to or acquiescing in the obstruction¹⁹. If, however, in such a claim the court decides against the claimant's²⁰ claim it may direct the above provisions to apply as if the claim had not been brought²¹.

1 Rights of Light Act 1959 s 3(1).

2 See *ibid* s 2(3)(b); and *PARA 244 ante*.

3 *Ibid* s 3(2).

4 As to the registering authority see *PARA 244 note 2 ante*.

5 le without prejudice to the Local Land Charges Rules 1977, SI 1977/985, r 10(1)-(5): see note 14 *infra*; and PARA 244 *ante*.

6 For these purposes, 'temporary certificate' means a certificate issued under the Rights of Light Act 1959 s 2(3)(b) (see PARA 244 *ante*): Local Land Charges Rules 1977, SI 1977/985, r 10(7).

7 For these purposes, 'definitive certificate' means a certificate issued under the Rights of Light Act 1959 s 2(3)(a) (see PARA 244 *ante*): Local Land Charges Rules 1977, SI 1977/985, r 10(7).

8 le in pursuance of the Local Land Charges Rules 1977, SI 1977/985 (as amended).

9 *Ibid* r 10(6).

10 Rights of Light Act 1959 s 3(3).

11 The statutory wording is 'action': but a civil action is now referred to as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

12 Rights of Light Act 1959 s 3(3) proviso.

13 *Ibid* s 3(4).

14 *Ibid* s 3(5). Any rules made under the Local Land Charges Act 1975 s 14 (as amended) for the purposes of the Rights of Light Act 1959 s 2 must, without prejudice to the inclusion therein of other provisions as to cancelling or varying the registration of notices or agreements, include provision for giving effect to any order of the court under s 3(5): s 5(2) (amended by the Local Land Charges Act 1975 s 17(2), Sch 1).

On receiving an office copy of a judgment or order directing the registration of a light obstruction notice to be varied or cancelled, the registering authority must file the office copy with the application for that registration and must amend or cancel the registration accordingly: Local Land Charges Rules 1977, SI 1977/985, r 10(4).

15 See the Prescription Act 1832 s 4 (as amended); and PARA 109 *ante*.

16 Rights of Light Act 1959 s 3(6)(a).

17 le by virtue of *ibid* s 3(3) or (4).

18 *Ibid* s 3(6)(b).

19 *Ibid* s 3(6)(c).

20 The statutory wording is 'plaintiff'; but a plaintiff is now referred to as a 'claimant': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

21 Rights of Light Act 1959 s 3(6) proviso.

UPDATE

245 Effect of registration of light obstruction notice

NOTES 6, 7--SI 1977/985 r 10(7) amended: SI 2009/1307.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/246. Remaindermen and reversioners.

246. Remaindermen and reversioners.

A right to light may be acquired under the Prescription Act 1832¹ against remaindermen and reversioners of the servient tenement even if, during the statutory period, the land has been in the hands of a tenant, and consequently they have been unable to oppose the user or enjoyment². This is because the Act does not require the enjoyment to have been enjoyment as of right³. Where the tenements are held by two persons under leases from the same landlord the lessee of either tenement may, during his term, acquire under the Act an easement of light as against the other lessee and his own landlord as the reversioner of the servient tenement, in spite of the unity of ownership in the common landlord⁴.

1 le under the Prescription Act 1832 s 3 (as amended): see PARA 237 ante.

2 *Simper v Foley* (1862) 2 John & H 555; cf *Wheaton v Maple & Co* [1893] 3 Ch 48, CA.

3 *Kilgour v Gaddes* [1904] 1 KB 457 at 462, CA.

4 *Frewen v Philipps* (1861) 11 CBNS 449, Ex Ch; *Mitchell v Cantrill* (1887) 37 ChD 56, CA; *Robson v Edwards* [1893] 2 Ch 146; *Morgan v Fear* [1907] AC 425, HL; *Mallam v Rose* [1915] 2 Ch 222; cf also *Wheaton v Maple & Co* [1893] 3 Ch 48, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/247. The Crown.

247. The Crown.

No right to light can be acquired under the Prescription Act 1832¹ as against the Crown². The Crown is mentioned in the provisions of that Act relating to other rights, easements and profits³, but not in the provisions relating to rights to light, and by a rule of construction no Act of Parliament binds the Crown unless the Crown is expressly mentioned or unless the intention to bind the Crown is clear and unmistakable⁴. Similarly, no easement of light can be acquired under the Act as against a tenant holding a lease from the Crown⁵. The Rights of Light Act 1959 extends to land in which there is a Crown or duchy interest⁶, but the Prescription Act 1832, as modified by the Act of 1959⁷, is not to be construed as applying to any land to which it would not apply apart from the Act of 1959⁸.

1 le under the Prescription Act 1832 s 3 (as amended): see PARA 237 ante.

2 *Perry v Eames* [1891] 1 Ch 658; *Wheaton v Maple & Co* [1893] 3 Ch 48, CA. See also PARAS 76 note 2, 95 note 1 ante.

3 le in the Prescription Act 1832 ss 1, 2 (as amended): see PARA 99 et seq ante.

4 *Perry v Eames* [1891] 1 Ch 658 at 665; *Wheaton v Maple & Co* [1893] 3 Ch 48 at 64, CA, per Lindley LJ; and see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 389-390; and see generally STATUTES. It is thought that nothing in the Crown Proceedings Act 1947 alters the law as stated in the text.

5 *Wheaton v Maple & Co* [1893] 3 Ch 48, CA; cf *Bright v Walker* (1834) 1 Cr M & R 211.

6 Rights of Light Act 1959 s 4(1), (3).

7 Ibid s 1, which temporarily modified the Prescription Act 1832 by extending the period of 20 years' enjoyment to 27 years' enjoyment in certain circumstances, is, however, now repealed.

8 Rights of Light Act 1959 s 4(2).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(4) RIGHT TO LIGHT/(ii) Acquisition of Right to Light/248. Easement of light cannot be acquired for a term.

248. Easement of light cannot be acquired for a term.

The Prescription Act 1832 has not created a class of easements, whether easements of light or other easements, which cannot be gained by prescription at common law, such as an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement. Such easements cannot be acquired at law by prescription, although a grant or agreement may be effective in equity to create an enforceable right¹.

¹ *Wheaton v Maple & Co* [1893] 3 Ch 48 at 65, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(5) RIGHTS TO AIR/249. Easement of air.

(5) RIGHTS TO AIR

249. Easement of air.

The owner of property has no right in the natural course of things (*ex jure naturae*) to the passage of air to his tenement over his neighbour's land, and consequently he has no natural right to prevent his neighbour from using his land in such a way as to obstruct the free passage of air¹. A right, however, may be acquired as an easement whereby the owner of land upon which there are buildings can insist upon the continuance of the free passage of air to apertures in those buildings² and can prevent his neighbour who owns the servient tenement from interfering with the supply of air by building upon that tenement or otherwise³. This easement of air is very similar to the easement of light⁴. It is essential that the easement, unless existing by virtue of express grant or contract, should be in respect of a strictly defined and limited aperture⁵.

1 *Bland v Mosely* (1587) cited in *Aldred's Case* (1610) 9 Co Rep 57b at 58a; *Gale v Abbot* (1862) 8 Jur NS 987; *Dent v Auction Mart Co* (1866) LR 2 Eq 238; *Hall v Lichfield Brewery Co* (1880) 49 LJ Ch 655; *Bass v Gregory* (1890) 25 QBD 481; *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437; *Cable v Bryant* [1908] 1 Ch 259.

2 *Bryant v Lefever* (1879) 4 CPD 172, CA; *Webb v Bird* (1862) 13 CBNS 841, Ex Ch.

3 See the cases cited in note 1 supra.

4 *Cable v Bryant* [1908] 1 Ch 259 at 263.

5 *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437 at 446; *Chastey v Ackland* [1895] 2 Ch 389 at 402, CA, per Kay LJ; on appeal [1897] AC 155, HL; *Harris v De Pinna* (1886) 33 ChD 238, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(5) RIGHTS TO AIR/250. Acquisition of easement of air.

250. Acquisition of easement of air.

An easement of air may be acquired by express grant¹, it may arise by implication of law², and it may be acquired by prescription³ and under the doctrine of a lost modern grant⁴. There would appear to be no reason why it should not be an easement within the meaning of the Prescription Act 1832⁵ and be capable of being acquired by prescription under the provisions of that Act⁶.

A right to the general passage of air not flowing in any defined channel may be the subject of express grant or covenant⁷, but is not capable of being claimed either by prescription at common law or by grant or under the Prescription Act 1832⁸. Such a claim is too vague and indefinite to be recognised in law⁹.

1 See *Cable v Bryant* [1908] 1 Ch 259; *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437 at 445; *Bryant v Lefever* (1879) 4 CPD 172 at 177, CA, per Bramwell LJ.

2 *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437.

3 *Cable v Bryant* [1908] 1 Ch 259 at 264; *Hall v Lichfield Brewery Co* (1880) 49 LJ Ch 655; *Bass v Gregory* (1890) 25 QBD 481.

4 *Bass v Gregory* (1890) 25 QBD 481.

5 See the Prescription Act 1832 s 2 (as amended); and PARA 99 ante. As to prescription under that Act see PARA 99 et seq ante.

6 See *Cable v Bryant* [1908] 1 Ch 259 at 263-264. The easement may also arise by virtue of the Leasehold Reform Act 1967 s 10(2): see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1453.

7 *Harris v De Pinna* (1886) 33 ChD 238 at 258, CA, per Cotton LJ, and at 263 per Fry LJ; *Chastey v Ackland* [1895] 2 Ch 389 at 402, CA, per Lindley LJ; compromised on appeal [1897] AC 155, HL. Such a grant or covenant would necessarily be a restrictive covenant binding the servient tenement preventing erections on the servient tenement. As to restrictive covenants see EQUITY vol 16(2) (Reissue) PARA 613 et seq.

8 See *Bryant v Lefever* (1879) 4 CPD 172 at 180, CA; *Webb v Bird* (1862) 13 CBNS 841, Ex Ch; *Harris v De Pinna* (1886) 33 ChD 238 at 259-260, 262-264, CA; *Chastey v Ackland* [1895] 2 Ch 389 at 398, 402, CA; on appeal [1897] AC 155, HL.

9 *Webb v Bird* (1862) 13 CBNS 841, Ex Ch; *Chastey v Ackland* [1895] 2 Ch 389, CA; on appeal [1897] AC 155, HL.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(5) RIGHTS TO AIR/251. Right to pollute air.

251. Right to pollute air.

Every person has a natural right to enjoy the air pure and free from noxious smells or vapours, and anyone who sends on to or over his neighbour's land anything which makes the air impure commits a nuisance¹; but the right to send impure air over a neighbour's tenement may be acquired by statute², by express or implied grant or by lapse of time³.

1 *Chastey v Ackland* [1895] 2 Ch 389, CA; on appeal [1897] AC 155, HL; see also NUISANCE. As to statutory control of atmospheric pollution see the Clean Air Act 1993; and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH.

2 *Manchester Corp'n v Farnworth* [1930] AC 171 at 183, 187, HL (emission of noxious fumes from electricity undertaking; nuisance rendered not actionable by statute so far as inevitable; but no statutory defence in absence of reasonable diligence to prevent operations from becoming a nuisance).

3 *Crump v Lambert* (1867) LR 3 Eq 409 at 413; on appeal (1867) 17 LT 133.

UPDATE

251 Right to pollute air

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(6) RIGHTS TO PARK MOTOR VEHICLES/252. Easement of parking.

(6) RIGHTS TO PARK MOTOR VEHICLES

252. Easement of parking.

A right of parking appears to be capable of existing as an easement¹. It has been said that it is not a valid objection to the existence of such an easement that charges are made, whether for the parking itself or the general upkeep of the car park; the essential question is one of degree².

It has been held that there is a breach of an exclusive right to park on a specific area of the forecourt of a block of flats if the owner of the servient tenement so arranges things, or so permits things to be arranged, that, while the owner of the dominant tenement can park his car satisfactorily, it is not parked on the specific area designated in the right³.

It is a question of construction whether a right of way⁴ extends to a right to park; it has often been held to include a right to set down or pick up passengers or to load and unload goods⁵, without conferring a right to park a car or other vehicle on the carriageway outside the door⁶. However a right to 'use' a forecourt and roadway, or a road, has been held to confer a right to park⁷.

1 *Bilkus v Redbridge London Borough Council* (1968) 207 Estates Gazette 803; *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 4 All ER 157, [1994] 1 WLR 31, CA; *Newman v Jones* (22 March 1982, unreported), cited in *Handel v St Stephens Close Ltd* [1994] 1 EGLR 70, [1994] 05 EG 159; *Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 4 All ER 78, [2003] 1 WLR 764. It was left as an open question by the court of Appeal in *Saeed v Plustrade Ltd* [2001] EWCA Civ 2011, [2002] 2 P & CR 266, [2001] All ER (D) 334 (Dec) where it was said that there was no actual Court of Appeal decision on the point. Surprisingly the reference in that case to *Batchelor v Marlow* supra was only to the first instance decision ((2001) 81 P & CR D11, [2001] 1 EGLR 119). In the Court of Appeal in *Batchelor v Marlow* supra it was said to be common ground that a right to park could exist as an easement although on the facts the easement was not established. See also *Muggeridge v Gordon* (11 July 2000, unreported), CA.

2 *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307 at 317 per Judge Paul Baker QC, sitting as a judge of the High Court; affd [1993] 4 All ER 157, [1994] 1 WLR 31, CA. It is thought that this dictum should be construed in line with the concession made in *Re Ellenborough Park, Re Davies, Powell v Maddison* [1956] Ch 131 [1955] 3 All ER 667, CA, where it was conceded that the garden rights, if effectual and enforceable, were conditional upon the dominant owners making their appropriate contributions to the cost of upkeep. Cf the position with regard to the repair of rights of way: see PARA 176 ante.

3 *Stonebridge v Bygrave* [2001] All ER (D) 376 (Oct) per Neuberger J. As to the restriction of one party's right to park so as to allow both that party and another party to manoeuvre vehicles in a confined space at the end of a shared drive see *Dymond v Coombes* [2001] EWCA Civ 1706.

4 As to rights of way generally see PARA 156 et seq ante.

5 *Bulstrode v Lambert* [1953] 2 All ER 728, [1953] 1 WLR 1064 (applied in *Warmhaze Ltd v Soterios Aspris* [2001] All ER (D) 196 (Feb)); *N Allee & Co v David Hodson & Co* [2001] EWCA Civ 951, [2001] All ER (D) 141 (Jun). In *Patel v WH Smith (Eziot) Ltd* [1987] 2 All ER 569, [1987] 1 WLR 853, CA, a right of way was recognised as including a right to park for purposes of loading and unloading, but not beyond that.

6 *Das v Linden Mews Ltd* [2002] EWCA Civ 590, [2003] 2 P & CR 58, sub nom *Chand v Linden Mews Ltd* [2002] All ER (D) 09 (May).

7 *Papworth v Lindhaven* [1988] EGCS 54; *McClymont v Primecourt Property Management Ltd* [2000] EGCS 139, [2000] PLSCS 255.

UPDATE

252 Easement of parking

NOTE 1--A right to park is capable of being constituted as an accessory right incidental to a right of vehicular access where such a right is necessary for the comfortable use and enjoyment of the easement: *Moncrieff v Jamieson* [2007] UKHL 42, [2008] 4 All ER 752. However, if in the circumstances it is not necessary, but merely desirable, the right to park may not be constituted: *Waterman v Boyle* [2009] EWCA Civ 115, [2009] 21 EG 104, [2009] All ER (D) 285 (Feb) (claimant's right of vehicular access over land did not confer a right to park on that access route), distinguishing *Moncrieff* supra.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/5. PARTICULAR EASEMENTS/(6) RIGHTS TO PARK MOTOR VEHICLES/253. Circumstances in which right to park vehicles cannot be an easement.

253. Circumstances in which right to park vehicles cannot be an easement.

If the right to park vehicles granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land whether for parking or anything else, it cannot be an easement¹. The question whether it does so is one of degree, each case having to be decided on its own facts².

1 *Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 4 All ER 78, [2003] 1 WLR 764 (right to park vehicles on an area of land, between the hours of 8.30 am and 6 pm Monday to Friday, so as to preclude the use of the land for other purposes, not capable of being an easement); *Copeland v Greenhalf* [1952] Ch 488, [1952] 1 All ER 809 (right to store and repair an unlimited number of vehicles on the servient tenement not an easement). Contrast *Wright v Macadam* [1949] 2 KB 744, [1949] 2 All ER 565, CA (not a parking case).

2 *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307 at 317 per Judge Paul Baker QC, sitting as a judge of the High Court (affd [1993] 4 All ER 157, [1994] 1 WLR 31, CA); and see *Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 4 All ER 78, [2003] 1 WLR 764.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/254. Meaning of 'profit à prendre'.

6. PROFITS À PRENDRE

(1) NATURE OF PROFITS À PRENDRE

254. Meaning of 'profit à prendre'.

A profit à prendre¹ is a right to take something off another person's land². It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself³, for the use of the owner of the right⁴. A profit à prendre is a servitude⁵.

1 This part of the title only deals with the general principles relating to all profits à prendre, whether enjoyed in common or in severalty. The majority of cases dealing with profits à prendre relate to commonable rights, which are considered in COMMONS vol 13 (2009) PARA 401 et seq. For particular forms of profits à prendre enjoyed in severalty see ANIMALS vol 2 (2008) PARA 763 et seq (game rights); AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 808, MINES, MINERALS AND QUARRIES.

2 *Duke of Sutherland v Heathcote*[1892] 1 Ch 475 at 484, CA, per Lindley LJ; *Webber v Lee*(1882) 9 QBD 315, CA; and see *Lowe v JW Ashmore Ltd*[1971] Ch 545 at 557, [1971] 1 All ER 1057 at 1068. The converse does not hold; not all such rights are profits: *Lowe v JW Ashmore Ltd* supra at 557 and at 1068.

3 *Manning v Wasdale* (1836) 5 Ad & El 758 at 764 per Patteson J ('a profit à prendre ... must be something taken out of the soil'). See also PARA 44 note 2 ante.

4 For judicial dicta from which the nature of a profit à prendre may best be gathered see *Manning v Wasdale* (1836) 5 Ad & El 758 at 763 per Lord Denman CJ, and at 764 per Patteson J; *Sury v Pigot* (1626) Poph 166, per Whitlock CJ; *Wickham v Hawker* (1840) 7 M & W 63 at 79 per Parke B; *Race v Ward* (1855) 4 E & B 702 at 709; *Webber v Lee*(1882) 9 QBD 315, CA. In *Benson v Chester* (1799) 8 Term Rep 396 at 401, Lord Kenton CJ speaks of a right of common which is a profit à prendre as an 'easement over the soil'. See also *Warburton v Parke* (1857) 2 H & N 64 at 69 per Bramwell B; *White v Williams*[1922] 1 KB 727, CA (sheepwalk or right of depasturing sheep); *Peech v Best*[1931] 1 KB 1, CA (shooting rights); *Mason v Clarke*[1955] AC 778, [1955] 1 All ER 914, HL (rabbiting rights).

5 See PARA 3 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/255. Profit à prendre as an interest in land.

255. Profit à prendre as an interest in land.

A profit à prendre is an interest in land, and for this reason any disposition of it must be in writing¹. A profit à prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce².

On an oral letting a profit à prendre may be reserved orally³. Leases or agreements of tenancy may contain reservations of profits à prendre; these operate as if they were made by way of regrant⁴.

1 Law of Property Act 1925 s 53. A contract for the sale or other disposition of a profit à prendre can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each: Law of Property (Miscellaneous Provisions) Act 1989 s 2(1). The terms may be incorporated in a document either by being set out in it or by reference to some other document: s 2(2). The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract: s 2(3). See further SALE OF LAND vol 42 (Reissue) PARA 29 et seq. A profit à prendre was held to fall within earlier corresponding provisions: see *Webber v Lee* (1882) 9 QBD 315, CA; *Smart v Jones* (1864) 15 CBNS 717 at 724 per Willes J.

2 *Webber v Lee* (1882) 9 QB 315, CA.

3 *Jones v Williams and Roberts* (1877) 46 LJMC 270, DC. The statement by Lindley J at 272 is general but is presumably applicable only to lettings excluded from the requirement of writing by the Law of Property Act 1925 s 54(2).

4 See PARA 60 ante, para 273 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/256. What may be taken as a profit à prendre.

256. What may be taken as a profit à prendre.

The subject matter of a profit à prendre, namely the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals¹, including fish and fowl², which are on the land, or of vegetable matter growing³ or deposited on the land by some agency other than that of man⁴, or of any part of the soil itself⁵, including mineral accretions to the soil by natural forces⁶. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them⁷. Rights have been established as profits à prendre to take acorns and beech mast⁸, brakes, fern, heather and litter⁹, thorns¹⁰, turf and peat¹¹, boughs and branches of growing trees¹², rushes¹³, freshwater fish¹⁴, stone¹⁵, sand and shingle from the seashore¹⁶ and ice from a canal¹⁷; also the right of pasture¹⁸ and of shooting pheasants¹⁹. There is, however, doubt as to the right to take seacoal from the foreshore²⁰. The right to take wild animals while they are upon the soil belongs to the owner of the soil, who may grant to others as a profit à prendre a right to come and take them by a grant of hunting, shooting, fowling and so forth²¹.

As is the case with an easement the grant of a profit à prendre carries with it the grant of such ancillary rights as are reasonably necessary for the enjoyment of the profit²².

1 *Earl De la Warr v Miles* (1881) 17 ChD 535, CA; *Wickham v Hawker* (1840) 7 M & W 63; *Ewart v Graham* (1859) 7 HL Cas 331 at 344-345; *Peech v Best* [1931] 1 KB 1, CA.

2 *Wickham v Hawker* (1840) 7 M & W 63; *Webber v Lee* (1882) 9 QBD 315, CA; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139.

3 *Earl De la Warr v Miles* (1881) 17 ChD 535, CA; *Bean v Bloom* (1773) 2 Wm Bl 926; *Dowglas v Kendal* (1610) 1 Bulst 93; *Willingale v Maitland* (1866) LR 3 Eq 103; *White v Williams* [1922] 1 KB 727, CA.

4 See *Smart v Jones* (1864) 15 CBNS 717 at 724, where a right to take cinders from a cinder tip is treated upon the footing of its not being a profit à prendre.

5 See eg *Maxwell v Martin* (1830) 6 Bing 522.

6 *Blewett v Tregonning* (1835) 3 Ad & El 554, where it was held that a right to take sand which had been deposited on the land by the wind was a profit à prendre.

7 *Webber v Lee* (1882) 9 QBD 315 at 319, CA; *Lowe v JW Ashmore Ltd* [1971] Ch 545 at 557, [1971] 1 All ER 1057 at 1068.

8 *Chilton v London Corpn* (1878) 7 ChD 562. As to pannage (the right to feed pigs on acorns) see COMMONS vol 13 (2009) PARA 415.

9 *Earl De la Warr v Miles* (1881) 17 ChD 535, CA.

10 *Douglas v Kendal* (1610) Cro Jac 256. Cf *Bailey v Stephens* (1862) 12 CBNS 91.

11 As to turbary see COMMONS vol 13 (2009) PARAS 457, 458; *Hayward v Cunnington* (1668) 1 Lev 231; *Lowe v JW Ashmore Ltd* [1971] Ch 545, [1971] 1 All ER 1057 (right to take turves a profit à prendre and not an equitable fee simple). Cf *Valentine v Penny* (1605) Noy 145; *Peardon v Underhill* (1850) 16 QB 120.

12 *Willingale v Maitland* (1866) LR 3 Eq 103. As to estovers, the right to cut or prune in forests, see COMMONS vol 13 (2009) PARAS 459, 460.

13 *Bean v Bloom* (1773) 2 Wm Bl 926.

14 *Smith v Kemp* (1693) 2 Salk 637; *Holford v Bailey* (1849) 13 QB 426, Ex Ch; *Fitzgerald v Firkbank* [1897] 2 Ch 96, CA; *Grove v Portal* [1902] 1 Ch 727. As to the question whether the right of taking oysters is or is not a profit à prendre see *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL; *Mills v Colchester Corpn* (1867) LR 2 CP 476; affd (1868) LR 3 CP 575, Ex Ch. See also *Colchester Corpn v Brooke* (1846) 7 QB 339, Ex Ch; *Truro Corpn v Rowe* [1902] 2 KB 709, CA; *Parker v Lord Advocate* [1904] AC 364, HL (mussels); *Adair v National Trust for Places of Historic Interest or Natural Beauty* [1998] NI 33 (there is (1) a right to take fish from the tidal waters around the United Kingdom; (2) a right to take shell-fish from the foreshore; and (3) an ancillary right to take lugworms from the foreshore, provided the taking of such worms is related to the actual or intended use of the right to fish and is for a person's individual use, not for commercial purposes). As to piscary see COMMONS vol 13 (2009) PARAS 461-464.

15 *Maxwell v Martin* (1830) 6 Bing 522; cf *Clayton v Corby* (1843) 5 QB 415. See also COMMONS vol 13 (2009) PARA 465.

16 *Constable v Nicholson* (1863) 14 CBNS 230.

17 *Newby v Harrison* (1861) 1 John & H 393; affd 4 LT 424.

18 *Johnson v Barnes* (1873) LR 8 CP 527, Ex Ch; *White v Williams* [1922] 1 KB 727, CA (right to depasture sheep); and see *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015; *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417; and COMMONS vol 13 (2009) PARA 439.

19 *Lowe v Adams* [1901] 2 Ch 598; cf *Rigg v Earl of Lonsdale* (1857) 1 H & N 923, Ex Ch; *Duke of Devonshire v Lodge* (1827) 7 B & C 36.

20 The majority of the Court of Appeal in *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA, thought that the right to take sea-coal from the foreshore, had it existed, would have constituted a profit à prendre, but the claim failed because a fluctuating body could not acquire a prescriptive right of that nature.

21 *Ewart v Graham* (1859) 7 HL Cas 331 at 345-346, per Lord Campbell LC; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139. See *Peech v Best* [1931] 1 KB 1 at 9, CA, per Scrutton LJ; and see ANIMALS vol 2 (2008) PARAS 718, 763 et seq.

22 *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1025; and see PARA 21 ante in relation to easements.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/257. Subject matter must be capable of ownership.

257. Subject matter must be capable of ownership.

The subject matter of a profit à prendre must be something which is capable of ownership¹, for otherwise the right would amount to a mere easement². Thus a right to take water is not a profit à prendre because water is not capable of being owned³.

1 *Race v Ward* (1855) 4 E & B 702 at 709, per Lord Campbell CJ; 2 Bl Com (14th Edn) 14.

2 *Race v Ward* (1855) 4 E & B 702; *Weekly v Wildman* (1698) 1 Ld Raym 405 at 407. For the distinction between a profit à prendre and an easement see PARA 44 ante.

3 *Race v Ward* (1855) 4 E & B 702; *Manning v Wasdale* (1836) 5 Ad & El 758.

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257 Subject matter must be capable of ownership

NOTE 3--However, see *Mitchell v Potter* (2005) Times, 24 January, CA (grant of right of water from a reservoir on the vendor's land in a conveyance of right to the purchaser was a grant of profit à prendre).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/258. Several and common rights.

258. Several and common rights.

The right constituting the profit à prendre may either be exercisable to the exclusion of all other persons, in which case it is said to be a right in severalty or a several profit à prendre¹; or it may be exercisable in common with one or more persons, including the owner of the land², in which case it is called a profit à prendre in common, or more usually a right of common³.

A legal estate in a profit à prendre may be created, held and exercised in common with other persons⁴.

1 As to the distinction between several rights and rights of common see generally *Robinson v Duleep Singh* (1879) 11 ChD 798; *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 423-424, CA; affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL; and see COMMONS vol 13 (2009) PARA 401 et seq.

2 See COMMONS vol 13 (2009) PARA 405. Almost all rights of common are profits à prendre, but all profits à prendre are not necessarily rights of common. The right to take a particular substance from another person's land may in one case be a right in severalty, and in another a right of common: see *Fitzpatrick v Verschoyle* [1912] 1 IR 8 (management of bog, several persons having a right of turbary).

3 Profits à prendre are rights which are almost entirely based upon the system of landholding as it formerly existed. Many of these rights have existed from a very early date; others are governed by considerations and requirements the pertinency of which no longer exists, but which are directly or indirectly attributable to the manorial system as formerly obtaining. The communal enjoyment of profits à prendre is the direct outcome of that system, and occurs not only in localities where that system remains intact, but also in places where most other traces of the system have disappeared. Enjoyment of profits à prendre as rights in severalty, a mode of enjoyment less prevalent than communal enjoyment, is, on the whole, of more modern origin, although instances occur in early times. As to the origin of profits à prendre see REAL PROPERTY vol 39(2) (Reissue) PARA 31 et seq; COMMONS vol 13 (2009) PARAS 403-405.

4 Law of Property Act 1925 s 187(2): see PARA 10 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/259. Classification of profits à prendre.

259. Classification of profits à prendre.

By analogy to the case of easements, the land over which the right to a profit à prendre is exercised is called the 'servient tenement' and the owner of that land the 'servient owner'. If the right is enjoyed as appendant or appurtenant to the ownership of other land, that land is called the 'dominant tenement' and the owner of it the 'dominant owner'¹. Unlike an easement, however, a profit à prendre may also exist in gross; that is to say it may exist as a right of property in favour of a person and his heirs or for any other estate or interest, quite unconnected with any estate or interest which the owner may have in any land². Where a profit à prendre exists in gross there is of course no dominant tenement³.

1 See *Warburton v Parke* (1857) 2 H & N 64 at 68 et seq; and PARA 2 ante.

2 *Shuttleworth v Le Fleming* (1865) 19 CBNS 687; *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 421, CA, per Buckley LJ; affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL; *Webber v Lee* (1882) 9 QBD 315, CA. See also *Cowlam v Slack* (1812) 15 East 108 at 115 per Lord Ellenborough CJ; *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 at 161, where a claim to a profit à prendre in gross failed for want of proof. For instances of profits à prendre existing in gross see *Daniel v Hanslip* (1672) 2 Lev 67; *Johnson v Barnes* (1873) LR 8 CP 527, Ex Ch (right of pasturage owned by the Colchester corporation); *Shuttleworth v Le Fleming* supra (right of fishing); *Webber v Lee* supra (right to shoot and take away game); *Spooner v Day and Mason* (1636) Cro Car 432; *Lowe v JW Ashmore Ltd* [1971] Ch 545, [1971] 1 All ER 1057 (profit of turbary in gross). See also *Staffordshire and Worcestershire Canal Navigation v Bradley* [1912] 1 Ch 91.

3 See PARA 10 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/260. Profits à prendre appendant.

260. Profits à prendre appendant.

Profits à prendre connected with the holding of a dominant tenement are either appendant or appurtenant, the latter being the more usual. A profit à prendre appendant is a right which arose at common law upon the grant of arable land prior to the Statute of Quia Emptores¹. Before the passing of this statute, when a lord of the manor enfeoffed a person of some parcels of arable land the feoffee thereby became entitled to certain ancillary rights with respect to other land in the manor²; after the statute was passed these rights no longer arose upon a grant of the land. Consequently all profits à prendre appendant must have come into existence prior to 1290. Profits à prendre appendant are therefore said to be 'of common right'³.

1 18 Edw 1 (Quia Emptores) (1289). See also COMMONS vol 13 (2009) PARAS 431, 433 et seq, where the distinction between rights of common appendant and appurtenant is discussed; and *Davies v Davies* [1975] QB 172, [1974] 3 All ER 817, CA.

2 2 Co Inst 85-86; *Lord Dunraven v Llewellyn* (1850) 15 QB 791 at 810. Feoffment was the feudal mode of transferring freehold estates in possession; enfeoffment was the act of transfer.

3 *Tyrringham's Case* (1584) 4 Co Rep 36b; and see COMMONS vol 13 (2009) PARA 405.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/261. Profits à prendre appurtenant.

261. Profits à prendre appurtenant.

Profits à prendre appurtenant are 'against common right': they are rights attached to the ownership of a particular piece of land, not as the necessary consequence of the original tenure, but because of a grant, prescription or other extraneous means. In general they cannot be severed or enjoyed apart from the dominant tenement, and they pass with the dominant tenement into the hands of each successive owner¹. The general words which by statute are implied as included in a conveyance or disposition of the dominant tenement² include such a profit à prendre³.

The law as stated above applies to a right of common of pasturage limited by levancy and couchancy⁴. A right of common pasturage may, however, be for a fixed number of animals in which case the right is severable⁵. The effect of the Commons Registration Act 1965⁶ is to transform, on registration, a right limited by levancy and couchancy into a right for a fixed number of animals with the consequence that the right becomes severable thereafter⁷.

1 *Warrick v Queen's College, Oxford* (1871) 6 Ch App 716. This is the general rule. For exceptions where the rights are limited to numbers of cattle, certain or fixed amounts of turves, wood or fish see COMMONS vol 13 (2009) PARA 401 et seq.

2 See the Law of Property Act 1925 s 62; and PARA 57 ante.

3 *White v Williams* [1922] 1 KB 727, CA; *Anderson v Bostock* [1976] Ch 312, [1976] 1 All ER 560.

4 See COMMONS vol 13 (2009) PARA 441.

5 *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417.

6 See the Commons Registration Act 1965 s 15(3).

7 *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417.

UPDATE

261 Profits à prendre appurtenant

NOTE 5--See also *Polo Woods Foundation v Shelton-Agar* [2009] EWHC 1361 (Ch), [2010] 1 All ER 539.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/262. Profits à prendre in gross.

262. Profits à prendre in gross.

Where a profit à prendre exists as a right in gross it may be assigned and dealt with as a valuable interest, according to the ordinary rules of property¹. In default of any disposition inter vivos or by will a profit à prendre in gross descends as an ordinary incorporeal hereditament².

¹ *Welcome v Upton* (1840) 6 M & W 536 at 542, per Lord Abinger CB; see also *Goodman v Saltash Corp'n* (1882) 7 App Cas 633 at 658, HL; *Bettison v Langton* [2001] UKHL 24, [2002] 1 AC 27, [2001] 3 All ER 417.

² See generally EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/263. Limit of profit à prendre.

263. Limit of profit à prendre.

Where a profit à prendre is claimed under the doctrine of prescription as being appurtenant to land it can only be claimed in connection with the enjoyment of the dominant tenement; the extent of the right claimed is necessarily measured by the size, nature or needs of the estate in respect of which the prescription is made¹. Thus, if the claim is for common of pasture, it must be for cattle levant and couchant; that is to say, it must be limited by the number of cattle capable of being supported during the winter upon the estate in respect of which the prescription is made. So, if it is for common of turbary, it must be limited by the number of chimneys or hearths in which the turf may be burnt; if it is for plough-bote or cart-bote, it must be limited by the instruments of tillage which have to be repaired². The grantee of a profit à prendre granting sporting rights of a similar nature is entitled to exercise them reasonably in accordance with common practice, notwithstanding some small risk to the beasts of the servient owner³.

In relation to a claim for right of common of pasturage, as an alternative to levancy and couchancy it may be for a fixed number of animals⁴, but otherwise it appears that a profit à prendre, unlimited by any considerations as to the nature of the dominant tenement, cannot be made appurtenant to land, even by express grant⁵. Such a profit à prendre can, however, exist in gross⁶.

1 *Bailey v Stephens* (1862) 12 CBNS 91; *Lord Chesterfield v Harris* [1908] 2 Ch 397, CA; affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL; *Clayton v Corby* (1843) 5 QB 415 at 419 per Lord Denman CJ; *Edgar v English Fisheries Special Comrs* (1870) 23 LT 732 at 737-738 per Willes J; *A-G v Mathias* (1858) 4 K & J 579 at 591-592.

2 *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 421, CA, per Buckley LJ and at 410 per Cozens-Hardy MR: 'the very idea of a que estate seems to involve some relation between the needs of the estate or its owner and the extent of the profit à prendre'. See also PARA 261 note 1 ante.

3 See *Mason v Clarke* [1955] AC 778, [1955] 1 All ER 914, HL (rabbiting rights; right to set snares in fields where sheep pastured); *Peech v Best* [1931] 1 KB 1 at 14, CA, per Scrutton LJ (where the dominant owner recovered for the alteration of user of part of the servient tenement, it being said that both landlord and sporting tenant must use the land reasonably); cf *Mason v Clarke* supra at 795 and at 921 per Viscount Simonds; *Cope v Sharpe* [1910] 1 KB 168, DC; *Cope v Sharpe (No 2)* [1912] 1 KB 496, CA (outbreak of fire; sporting tenant's right to protect his profit à prendre).

4 See PARA 261 ante; and COMMONS vol 13 (2009) PARA 441 et seq. However, it seems that a common of pasture appendant can only be limited by levancy and couchancy: see COMMONS vol 13 (2009) PARA 433.

5 *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 410, CA, per Cozens-Hardy MR; affd sub nom *Harris v Earl of Chesterfield* [1911] AC 623, HL; *Anderson v Bostock* [1976] Ch 312, [1976] 1 All ER 560 (an appurtenant exclusive and unlimited right of grazing is a right unknown to the law).

6 *Lord Chesterfield v Harris* [1908] 2 Ch 397 at 423, CA, per Buckley LJ; *Mellor v Spateman* (1669) 1 Saund 343.

UPDATE

263 Limit of profit à prendre

NOTE 1--The needs of the estate and accommodation of the dominant tenement by the profit are two separate conditions to be met in establishing a valid profit à prendre and there is no test of real or appreciable benefit to the dominant tenement to be passed before a profit claimed can be said to accommodate it or to establish the necessary connection between the right and the dominant tenement: *Polo Woods Foundation v Shelton-Agar* [2009] EWHC 1361 (Ch), [2010] 1 All ER 539.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/264. Duration of profit à prendre.

264. Duration of profit à prendre.

A profit à prendre may be created for an estate in perpetuity analogous to an estate in fee simple, or for any less period or interest, such as a term of years¹, and is a tenement in the strict legal sense of the term².

¹ *Hooper v Clark* (1867) LR 2 QB 200; *Birkbeck v Paget* (1862) 31 Beav 403. See eg *Fitzgerald v Firbank* [1897] 2 Ch 96, CA; *Grove v Portal* [1902] 1 Ch 727; *Holford v Bailey* (1849) 13 QB 426 at 446, Ex Ch.

² *Doe d Hanley v Wood* (1819) 2 B & Ald 724; *Muskett v Hill* (1839) 5 Bing NC 694; *Martyn v Williams* (1857) 1 H & N 817 at 827; Co Litt 20a. Cf *R v Piddletrenthide Inhabitants* (1790) 3 Term Rep 772 at 775, where a rabbit warren was held to be a tenement within the meaning of the Poor Relief Act 1662 (repealed). 'Tenement'...signifies every thing that may be holden, provided it be of permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind': 2 Bl Com (14th Edn) 16-17; *Earl of Beauchamp v Winn* (1873) LR 6 HL 223.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/265. Rights of owner of profit à prendre.

265. Rights of owner of profit à prendre.

The owner of a profit à prendre has rights of a possessory nature, and can bring a claim for trespass at common law for their infringement¹. A profit differs from an easement in this respect, for the owner of an easement cannot sustain trespass, but can only protect his rights by abatement or a claim for nuisance². Although the primary remedy for the owner of a profit is trespass, he may in a suitable case maintain a claim for nuisance if he is disturbed or adversely affected in the enjoyment of it³.

1 *Fitzgerald v Firbank* [1897] 2 Ch 96 at 101, CA, per Lindley LJ; *Holford v Bailey* (1849) 13 QB 426; *Mason v Clarke* [1955] AC 778 at 798-799, [1955] 1 All ER 914 at 923, HL, per Lord Morton of Henryton. See also *Lowe v Adams* [1901] 2 Ch 598; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84; *Cronin v Connor* [1913] 2 IR 119 (damage by cattle of owner of the soil to turf of owner of right of turbary).

2 See PARA 146 et seq ante; and *Paine & Co Ltd v St Neots Gas and Coke Co Ltd* [1939] 3 All ER 812, CA.

3 *Fitzgerald v Firbank* [1897] 2 Ch 96 at 102, CA, per Lindley LJ; *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343 at 348-349, CA (there being invasion of a proprietary legal right, specific damage need not be alleged or proved); and see *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1952] 1 All ER 1326; on appeal [1953] 1 Ch 149, [1953] 1 All ER 179, CA, where the natural rights of riparian landowners in respect of water in a river as well as a fishery were injured by pollution commencing upstream.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/266. Distinction between profits à prendre and licences.

266. Distinction between profits à prendre and licences.

Profits à prendre, though sometimes called 'licences'¹, must be carefully distinguished from mere licences, which are not tenements and do not pass any interest or alter or transfer property in anything, but only make an act lawful which otherwise would have been unlawful². A mere licence is not transferable, nor can it be perpetual; it is not binding on the tenement affected, but is a personal matter between the licensor and the licensee. It is generally revocable and merely excuses a trespass until it is revoked³.

¹ See *Doe d Hanley v Wood* (1819) 2 B & Ald 724.

² *Thomas v Sorrell* (1673) Vaugh 330 at 351, Ex Ch; see eg *Jarvis v Smith* (1957) 107 L Jo 476. As to licences in relation to land see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 9 et seq; MINES, MINERALS AND QUARRIES; TORT.

³ *Hewlins v Shippam* (1826) 5 B & C 221 at 232. 'If one license me and my heirs to come and hunt in this park, I must have a writing (that is, a deed) of that license, for a thing passes by the license which indures in perpetuity; but if he license me one time to hunt, this is good without deed, for no inheritance passes': *Purrie v Green* (1495) YB 11 Hen 7, fo 8a, per Serjeant Keble in his argument at 8b, cited in *Wickham v Hawker* (1840) 7 M & W 63 at 79 per Parke B. For the distinction between licences and profits à prendre see *Hooper v Clark* (1867) LR 2 QB 200. See also PARA 37 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(1) NATURE OF PROFITS À PRENDRE/267. Devolution of profits à prendre.

267. Devolution of profits à prendre.

In relation to registered land the provisions of the Land Registration Act 1925 (now repealed) and the Land Registration Act 2002 applicable to easements, which are equally applicable to profits à prendre, have been dealt with in connection with easements¹. Under the 1925 Act a profit à prendre in gross could only be protected by an entry against the title of the relevant land if that land was registered. Under the 2002 Act it can be registered in its own right².

Where these provisions do not apply the position is that, like an easement, a legal profit à prendre passes with the dominant tenement and the burden binds the owner of the servient tenement notwithstanding any disposition of the servient tenement by him³. The holder of a profit à prendre for a merely equitable interest created or arising after 1925 may register it as a land charge⁴ and, if not so registered, it is void as against a purchaser of a legal estate for money or money's worth in the servient tenement⁵. Registration constitutes actual notice as from the date of registration⁶.

1 See PARAS 61-62 ante.

2 See the Land Registration Act 2002 s 3(1)(d), (2)-(7); and LAND REGISTRATION.

3 Law of Property Act 1925 s 187.

4 Law of Property Act 1925 ss 1(2)(a), (3), 205(1), (ix), (x) ((s 205(1)(ix), (x) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

5 Land Charges Act 1972 s 2(5)(iii).

6 Law of Property Act 1925 s 199(1)(i); Land Charges Act 1972 s 4(6) (amended by the Finance Act 1975 s 52, Sch 12 paras 2, 18(1), (5); the Inheritance Tax Act 1984 s 276, Sch 8 para 13). As to easements or profits created or arising for a merely equitable interest before 1926 and not registrable under the Land Charges Act 1972 see the Law of Property Act 1925 s 199(1) (ii), (3), (4).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(i) Creation by Grant or Statute/268. Creation of profit à prendre by express grant.

(2) CREATION OF PROFITS À PRENDRE

(i) Creation by Grant or Statute

268. Creation of profit à prendre by express grant.

A profit à prendre appurtenant or in gross, whether to be enjoyed in common or in severalty, may be created by express grant¹, but a profit à prendre appendant can no longer be created². Profits à prendre have always been regarded as incorporeal hereditaments only capable of being created by deed³. By statute, profits à prendre now lie in grant⁴, and no legal estate in them can be created or conveyed except by deed⁵. A profit à prendre may exist for a legal estate or interest, as it does when its origin is attributable to a grant by deed, express, implied by law or presumed from long user by prescription, and its duration is perpetual (equivalent to a fee simple absolute in possession) or for a term of years absolute⁶. It may also exist for an equitable interest only, as it does when its origin is not attributable to any such grant by deed⁷, even though otherwise capable of subsisting as a legal estate⁸, or its duration is neither perpetual (equivalent to a fee simple absolute in possession) nor a term of years absolute⁹.

Although a legal estate is not now capable of subsisting or being created in an undivided share in land¹⁰, this does not affect a person's right to acquire, hold or exercise a profit à prendre over or in relation to land for a legal estate in common with any other person¹¹.

1 *Cowlam v Slack* (1812) 15 East 108; *Fitzgerald v Firbank* [1897] 2 Ch 96, CA; *Goodman v Saltash Corpn* (1882) 7 App Cas 633 at 658, HL. The grant requires capacity on the part of the grantee. See *Westropp v Congested Districts Board* [1919] 1 IR 224, HL (a series of residents in a house); and *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015.

2 See PARA 260 ante.

3 *Wood v Leadbitter* (1845) 13 M & W 838 at 842-843, per Alderson B (that no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed is a proposition so well established, that it would be mere pedantry to cite authorities in its support); *Mason v Clarke* [1955] AC 778 at 798, [1955] 1 All ER 914 at 923, HL, per Lord Morton of Henryton; *Holford v Bailey* (1849) 13 QB 426, Ex Ch; Co Litt 42a; Bac Abr, Grants (E); Vin Abr, Grants (Ga); 2 Roll Abr 46; *Duke of Somerset v Fogwell* (1826) 5 B & C 875; cf *Marshall v Ulleswater Steam Navigation Co* (1863) 3 B & S 732 at 746-747 per Cockburn CJ (on appeal (1865) 6 B & S 570); *Hopkins v Robinson* (1671) 2 Lev 2.

4 Law of Property Act 1925 s 51(1).

5 Ibid s 52(1).

6 Ibid ss 1(2)(a), 205(1)(ix), (x) (s 205(1)(ix), (x) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

7 Cf *Lowe v Adams* [1901] 2 Ch 598; *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015.

8 Law of Property Act 1925 ss 1(3), 205(1)(ix), (x) (as amended: see note 6 supra).

9 Law of Property Act 1925 s 198(1) (amended by the Local Land Charges Act 1975 s 17(2), Sch 1); and see the Law of Property Act 1969 s 24 (as amended), s 25; the Land Charges Act 1972 s 16(1)(j), (k).

10 Law of Property Act 1925 s 1(6).

11 Ibid s 187(2).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(i) Creation by Grant or Statute/269. Creation of profit à prendre by statute.

269. Creation of profit à prendre by statute.

A profit à prendre may be created by statute. Early private Inclosure Acts frequently reserved or created rights of shooting to lords of manors over the land allotted to the commoners¹.

¹ See COMMONS vol 13 (2009) PARA 560.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(i) Creation by Grant or Statute/270. No particular form of grant necessary.

270. No particular form of grant necessary.

No particular form of grant and no particular words are necessary to create a profit à prendre¹, nor is the word 'grant' necessary in the deed creating the profit à prendre². If the effect of a deed or other instrument, when the words are taken as a whole, is to create a right of the nature of a profit à prendre, the instrument will be construed as a grant of that right, and all the legal incidents of the right will be established³, provided the subject matter of the deed is of such a nature that the law allows it to be created as a profit à prendre⁴.

It is no longer possible⁵ for a person who has an oral contract for the grant to him of a profit à prendre, and who has done acts in reliance on that contract, to obtain specific performance by virtue of the doctrine of part performance, but he may have a remedy on the basis of proprietary estoppel⁶.

Profits à prendre may be reserved⁷.

1 *Wickham v Hawker* (1840) 7 M & W 63 at 79; *Fitzgerald v Firbank* [1897] 2 Ch 96 at 103, CA; and see *Earl of Huntington and Lord Mountjoye's Case* (1583) 4 Leon 147. Cf *Holford v Bailey* (1894) 13 QB 426, Ex Ch; and see also *Doe d Hanley v Wood* (1819) 2 B & Ald 724, where a profit à prendre is spoken of as a licence.

2 Law of Property Act 1925 s 51(2).

3 *Fitzgerald v Firbank* [1897] 2 Ch 96, CA; *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 484, CA.

4 *Fitzgerald v Firbank* [1897] 2 Ch 96 at 103, CA, per Rigby LJ.

5 *Id* since the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989.

6 See *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA; *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA. See also PARA 39 ante; and ESTOPPEL vol 16(2) (Reissue) PARA 1089 et seq.

7 See PARA 255 the text to note 4 ante, para 273 post.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(i) Creation by Grant or Statute/271. How far grant confers exclusive right.

271. How far grant confers exclusive right.

A grant of a profit à prendre does not prima facie confer on the recipient an exclusive right to the whole of the substance which he may take¹, to the exclusion of the servient owner². However, such an exclusive right may be granted if the words are sufficient³.

1 *Earl of Huntington and Lord Mountjoye's Case* (1583) 4 Leon 147; *Newby v Harrison* (1861) 1 John & H 393 at 398-399; cf *Chetham v Williamson* (1804) 4 East 469.

2 *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 484-486, CA, where it was held that a grant of the full and free liberty to take coal did not exclude the right of the owner of the land from working mines, provided he did not disturb the grantee in his working operations when and where the latter carried them on. See MINES, MINERALS AND QUARRIES.

3 *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 485, CA; *Chetham v Williamson* (1804) 4 East 469; *Doe d Hanley v Wood* (1819) 2 B & Ald 724; *Carr v Benson* (1868) 3 Ch App 524 at 534-535; *Newby v Harrison* (1861) 1 John & H 393; *Wilkinson v Proud* (1843) 11 M & W 33 at 34. See also *Lowe v JW Ashmore Ltd* [1971] Ch 545, [1971] 1 All ER 1057.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(i) Creation by Grant or Statute/272. Who may take profits à prendre under a grant.

272. Who may take profits à prendre under a grant.

The owner of a profit à prendre may in general take the subject matter of the right either in person or by his employees, and he may also get the benefit of his right by selling or leasing an interest in the profit à prendre, for a longer or shorter term, to any person capable of taking such an interest; and so long as that interest endures the donee has an irrevocable licence to take so much of the profit as has thus been granted to him¹.

¹ *Goodman v Saltash Corpn* (1882) 7 App Cas 633 at 658, HL, per Lord Blackburn; *Grove v Portal* [1902] 1 Ch 727. A series of residents in a house are not capable of taking a grant of a profit à prendre: *Westropp v Congested Districts Board* [1919] 1 IR 224, HL.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(i) Creation by Grant or Statute/273. Effect of reservation of profits à prendre.

273. Effect of reservation of profits à prendre.

Profits à prendre cannot strictly form the subject of a reservation or exception¹, although sometimes they are expressed to be reserved or excepted from a conveyance or other disposition². When an owner of land conveys or demises it to another and purports to reserve a profit à prendre, the true effect is to create a new profit à prendre by way of a regrant³.

¹ *Doe d Douglas v Lock* (1835) 2 Ad & El 705 at 743, per Lord Denman; *Wickham v Hawker* (1840) 7 M & W 63 at 76, per Parke B. 'A reservation is always of a thing not in esse, but newly created or reserved out of the land or hereditament demised; an exception is ever of part of the thing granted and of a thing in esse': Co Litt 47a; and see PARA 59 ante.

² *Wickham v Hawker* (1840) 7 M & W 63.

³ See PARAS 60, 255 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(ii) Profits claimed by Prescription/274. Profits à prendre claimed by prescription or lost modern grant.

(ii) Profits claimed by Prescription

274. Profits à prendre claimed by prescription or lost modern grant.

A profit à prendre may be claimed by prescription at common law, including prescription under the doctrine of a lost modern grant¹, and profits à prendre which are appendant or appurtenant may also be claimed under the provisions of the Prescription Act 1832², which, however, does not apply to profits à prendre in gross³. Claims by prescription to profits of this last class are exceedingly rare⁴.

1 As to prescription generally see PARA 74 ante. See *Warrick v Queen's College, Oxford* (1871) 6 Ch App 716; *Dowglas v Kendal* (1610) Cro Jac 256 at 257; *English v Burnell and Ingham* (1765) 2 Wils 258; *Cowlam v Slack* (1812) 15 East 108; *Johnson v Barnes* (1873) LR 8 CP 527, Ex Ch; *Potter v North* (1669) 1 Saund 346; *Welcome v Upton* (1840) 6 M & W 536; *Baylis v Tyssen-Amhurst* (1877) 6 ChD 500; *Hanmer v Chance* (1865) 4 De GJ & Sm 626; *Haigh v West* [1893] 2 QB 19, CA; *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475, CA.

2 Prescription Act 1832 s 1 (amended by the Statute Law Revision Act 1890).

3 *Shuttleworth v Le Fleming* (1865) 19 CBNS 687 at 709; *Welcome v Upton* (1840) 6 M & W 536.

4 For cases of prescription for profits à prendre in gross see *Welcome v Upton* (1840) 6 M & W 536 (right of pasturage); *R v Churchill* (1825) 4 B & C 750 at 754-755; *Johnson v Barnes* (1873) LR8 CP 527, Ex Ch. See also *Lovett v Fairclough* (1990) 61 P & CR 385.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(ii) Profits claimed by Prescription/275. No claim to profit by custom.

275. No claim to profit by custom.

A profit à prendre cannot exist by custom¹ except in certain mining localities²; if it were otherwise the subject matter would soon become exhausted³ and the servient tenement would be subjected to an unreasonable burden, a release from which could never be obtained from the owners of the right who would necessarily be members of an undefined and fluctuating body⁴.

1 See CUSTOM AND USAGE vol 12(1) (Reissue) PARA 631. Cf *Adair v National Trust for Places of Historic Interest or Natural Beauty* [1998] NI 33.

2 For these special mining customs in Cornwall, Derbyshire and elsewhere see MINES, MINERALS AND QUARRIES.

3 See CUSTOM AND USAGE vol 12(1) (Reissue) PARA 632.

4 *A-G v Mathias* (1858) 4 K & J 579 at 591; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(ii) Profits claimed by Prescription/276. Who can claim profits à prendre by prescription.

276. Who can claim profits à prendre by prescription.

A profit à prendre can only be claimed by prescription in favour of persons who are, or whose predecessors in title were, capable of taking a grant; it cannot be claimed by an undefined and fluctuating body of persons not incorporated for the purpose of taking the grant¹. However, a grant of the right to a profit à prendre may be made to such persons by the Crown, the distinction being that the Crown, unlike a private individual, has power to create corporations and, if necessary in order to establish the validity of the grant, the grantees will be treated as a corporation with regard to their right to the grant².

1 *Lord Rivers v Adams* (1878) 3 ExD 361; *Tilbury v Silva* (1890) 45 ChD 98; *Baker v Brereman* (1635) Cro Car 418; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 at 474, [1967] 1 All ER 833 at 846, CA, per Harman LJ, applying *Blewett v Tregonning* (1835) 3 Ad & El 554 at 575; see also *Goodman v Saltash Corpn* (1882) 7 App Cas 633 at 648, 655, HL; *Westropp v Congested Districts Board* [1919] 1 IR 224, HL.

2 *Willingale v Maitland* (1866) LR 3 Eq 103 at 109 per Lord Romilly MR.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(ii) Profits claimed by Prescription/277. Presumption of grant to trustees for inhabitants.

277. Presumption of grant to trustees for inhabitants.

In order to support an alleged right which can be shown to have been long exercised by the free inhabitants of an ancient borough, and to clothe such user with legality, the court may in its desire to find a legal origin presume a grant to the corporation of that borough upon a trust in favour of the inhabitants¹.

¹ *Goodman v Saltash Corpn* (1882) 7 App Cas 633, HL. See also *Haigh v West* [1893] 2 QB 19, CA; *Re Company or Fraternity of Free Fishermen of Faversham* (1887) 36 ChD 329, CA; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, [1967] 1 All ER 833, CA (where the court refused to presume a trust).

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(ii) Profits claimed by Prescription/278. Claims to profits à prendre by lost modern grant.

278. Claims to profits à prendre by lost modern grant.

Claims to profits à prendre under the doctrine of a lost modern grant are governed by the same rules as apply to claims under this doctrine in respect of easements¹. Thus a lost modern grant of a profit à prendre will not be presumed where such a grant would have been in contravention of the express provisions of a statute².

¹ See PARA 91 ante.

² *Neaverson v Peterborough RDC* [1902] 1 Ch 557, CA; *Mill v New Forest Comr* (1856) 18 CB 60; and see PARA 48 the text and notes 3-5 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(2) CREATION OF PROFITS À PRENDRE/(ii) Profits claimed by Prescription/279. Claims to profits à prendre under the Prescription Act 1832.

279. Claims to profits à prendre under the Prescription Act 1832.

By the provision of the Prescription Act 1832 relating to prescriptive claims to profits à prendre appendant or appurtenant, no claim to any right of common¹ or other profit or benefit to be taken or enjoyed from or upon any land of the Crown, or the duchies of Lancaster and Cornwall, or any ecclesiastical or lay person or body corporate, where such right, profit or benefit has been actually taken and enjoyed by any person claiming right to it without interruption for the full period of 30 years, can be defeated or destroyed by showing only that that right, profit or benefit was first taken or enjoyed at any time prior to such period of 30 years². Such a claim may be defeated, however, in any of the other ways by which it might have been defeated at the time the Act was passed³. When such a right, profit or benefit has been enjoyed for the full period of 60 years, the right to it is deemed absolute and indefeasible unless it appears that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing⁴.

Each of these two periods of 30 and 60 years is to be deemed the period next before some suit or civil proceedings in which the claim or matter to which that period may relate has been or is brought into question⁵, and no act or other matter is to be deemed to be an interruption within the meaning of the Act unless it has been submitted to or acquiesced in for one year after the party interrupted has notice of the interruption and of the person making it or authorising it to be made⁶.

Uninterrupted enjoyment for the full period of 30 years must be shown, the onus of proof being on the claimant⁷.

The time during which any person otherwise capable of resisting any claim to any profit à prendre is under disability or a tenant for life, or during which any claim or suit is pending which has been diligently prosecuted⁸, is to be excluded in the computation of the two periods of 30 and 60 years, except only in cases where the right has been enjoyed for the period of 60 years without any written consent, in which case the fact that any of the disabilities mentioned exists is wholly immaterial⁹.

1 As to claims under the Prescription Act 1832 to rights of common see COMMONS vol 13 (2009) PARA 473.

2 Ibid s 1 (amended by the Statute Law Revision Act 1890).

3 Prescription Act 1832 s 1 (as amended: see note 2 supra). The Act was passed on 1 August 1832.

4 Ibid s 1 (as amended): see COMMONS vol 13 (2009) PARA 473.

5 See ibid s 4 (as amended); and PARA 109 ante; *Richards v Fry* (1838) 7 Ad & El 698; *Wright v Williams* (1836) 1 M & W 77.

6 Prescription Act 1832 s 4 (amended by the Statute Law Revision (No 2) Act 1888).

7 *Bailey v Appleyard* (1838) 8 Ad & El 161; *White v Taylor (No 2)* [1969] 1 Ch 160, [1968] 1 All ER 1015.

8 *Bailey v Appleyard* (1838) 8 Ad & El 161.

9 See the Prescription Act 1832 s 7; and PARA 101 note 1 ante.

Halsbury's Laws of England/EASEMENTS AND PROFITS A PRENDRE (VOLUME 16(2) (REISSUE))/6. PROFITS À PRENDRE/(3) EXTINGUISHMENT OF PROFITS À PRENDRE/280. Extinguishment of profit à prendre by statute.

(3) EXTINGUISHMENT OF PROFITS À PRENDRE

280. Extinguishment of profit à prendre by statute.

An Act of Parliament may extinguish a profit à prendre either expressly or impliedly. Such an extinguishment is often the result of a statutory enactment of which the extinguishment does not form any substantive part, but is the outcome of the exercise of some power expressly given by the Act or the fulfilment of some duty expressly imposed by it¹.

¹ Examples are awards made in pursuance of the Inclosure Acts: see COMMONS vol 13 (2009) PARA 419 et seq.

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281. Extinguishment of profit à prendre by release.

A profit à prendre may be extinguished by release either expressly¹ or by a regrant of the right to the owner of the servient tenement. Such a grant or release operates as an extinguishment of the right under the doctrine of merger, the rule being that a person cannot have a right to take a profit out of his own land as a separate right apart from the ordinary incidents of ownership². The release must be by all persons interested in the right³.

A profit à prendre, being an incorporeal hereditament, can only be released or regranted by deed, except in cases where release arises by implication of law⁴. Where the strict legal formalities for the release of a profit à prendre have not been observed, however, by an application of the general equitable principles of acquiescence and estoppel no person will be allowed to rely upon this non-observance if the circumstances would render such a defence inequitable⁵.

The rule relating to rights of common by which, if the owner of the right releases the right in respect of a portion of the land, the right is extinguished as regards the whole⁶ does not apply to profits à prendre existing as rights in severalty, and consequently separate parts of the servient tenement may be released from time to time from the burden of these several rights⁷.

A release of a profit à prendre which has been established will not be presumed from mere non-user⁸. Where, however, in answer to a prescriptive claim, the existence of the alleged profit à prendre is put in issue, proof of non-user may be effective in negating the existence of the right.

¹ *Johnson v Barnes* (1873) LR 8 CP 527, Ex Ch. Cf *Broome v Wenham* (1893) 68 LT 651. See COMMONS vol 13 (2009) PARA 503.

² Co Litt 280a, where it is said 'a man cannot have land and a common of pasture issuing out of the same land, et sic de ceteris'.

³ See *Benson v Chester* (1799) 8 Term Rep 396 at 399.

⁴ Co Litt 264b, where it is pointed out that there is a difference between a release in deed and a release in law, and that a release in deed or express release must of necessity be by deed, whereas releases in law may or may not be by deed; *Miles v Etteridge* (1692) 1 Show 349.

⁵ See PARA 132 ante, where this point is discussed in relation to easements.

⁶ *Rotherham v Green* (1597) Cro Eliz 593; *Morse v Well* (1610) 1 Brownl 180; *Miles v Etteridge* (1692) 1 Show 349; *Johnson v Barnes* (1873) LR 8 CP 527, Ex Ch; cf *Benson v Chester* (1799) 8 Term Rep 396 at 401 per Lord Kenyon CJ. See COMMONS vol 13 (2009) PARA 503.

⁷ *Johnson v Barnes* (1873) LR 8 CP 527, Ex Ch.

⁸ *Seaman v Vawdrey* (1810) 16 Ves 390 at 392 (mining rights); see also *Smith v Lloyd* (1854) 9 Exch 562; *Moore v Rawson* (1824) 3 B & C 332 at 339; *Carr v Foster* (1842) 3 QB 581. As to release by abandonment see PARAS 134-135 ante.

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282. Extinguishment of profit à prendre by unity of ownership.

When the ownership of the right constituting a profit à prendre and the ownership of the servient tenement become united in the same person the profit à prendre is extinguished¹. There can be no extinguishment by unity of ownership, however, unless the estate of the common owner in the servient tenement is at least as large as his estate in the profit à prendre².

1 *Tyrringham's Case* (1584) 4 Co Rep 36b; *Wyat Wild's Case* (1609) 8 Co Rep 78b; *Bradshaw v Eyre* (1597) Cro Eliz 570; *Nelson's Case* (1585) 3 Leon 128; *Musgrave v Inclosure Comrs* (1874) LR 9 QB 162 at 174; *Hall v Bryon* (1877) 4 ChD 667; Co Litt 122a; *Kimpton and Bellamy's Case* (1586) 1 Leon 43; *Worledg v Kingswel* (1600) Cro Eliz 794; and see COMMONS vol 13 (2009) PARA 495.

2 *R v Hermitage Inhabitants* (1692) Carth 239 at 241; *Bradshaw v Eyre* (1597) Cro Eliz 570; *Wyat Wild's Case* (1609) 8 Co Rep 78b; Co Litt 114b.

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283. Extinguishment of profit à prendre by exhaustion of subject matter.

If the subject matter of a profit à prendre becomes exhausted, the right may be thereby extinguished¹. The mere temporary exhaustion of the subject matter does not, however, necessarily extinguish the right², for in cases where there is a possibility of the subject matter coming into existence again the right is only suspended, and in the event of a re-appearance of the subject matter will again become exercisable³.

1 *Clarkson v Woodhouse* (1782) 5 Term Rep 412n; affd (1786) 3 Doug KB 194; *Peardon v Underhill* (1850) 16 QB 120; *Carr v Lambert* (1866) LR 1 Exch 168, Ex Ch. Cf *Grant v Gunner* (1809) 1 Taunt 435 at 448. See COMMONS vol 13 (2009) PARA 494.

2 Cf *Robertson v Hartopp* (1889) 43 ChD 484 at 517, CA; and see *Dean and Chapter of Ely v Warren* (1741) 2 Atk 189.

3 See *Carr v Lambert* (1866) LR 1 Exch 168, Ex Ch.

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284-400. Extinguishment of profit à prendre by alteration of tenement.

An alteration of the character of the dominant tenement by the dominant owner may be such as to indicate an intention on his part to abandon the right, in which case an implied release of the right will be presumed against him and he will not be allowed to set up a claim to its continuance¹.

An alteration of the servient tenement may also extinguish a profit à prendre if the owner of the profit acquiesces in an alteration which practically amounts to a destruction of the subject matter of the profit².

¹ *Moore v Rawson* (1824) 3 B & C 332 at 338; *R v Chorley* (1848) 12 QB 515; *Carr v Lambert* (1866) LR 1 Exch 168. See COMMONS vol 13 (2009) PARA 502.

² *Scrutton v Stone* (1893) 9 TLR 478 (right of pasture claimed over part of land which had gradually become covered with buildings); affd on another point 10 TLR 157, CA.